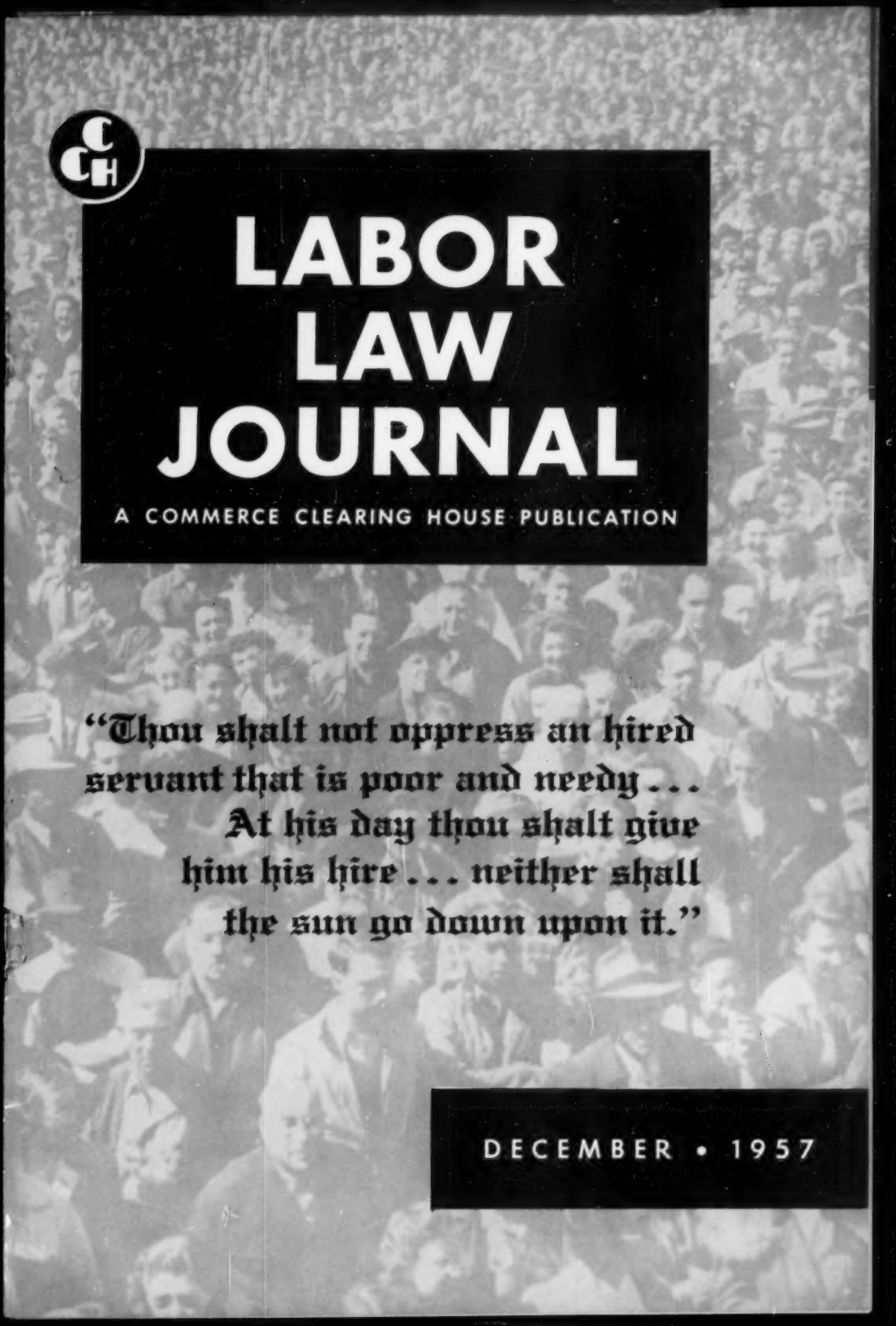

LABOR LAW JOURNAL

A COMMERCE CLEARING HOUSE PUBLICATION

"Thou shalt not oppress an hired servant that is poor and needy . . . At his day thou shalt give him his hire . . . neither shall the sun go down upon it."

DECEMBER • 1957

IN THIS ISSUE

Recently the Law School of The University of Chicago had a one-day labor conference. This conference was addressed by such well-known figures as Charles O. Gregory, George B. Christensen, Archibald Cox, Paul W. Williams, Sylvester Petro, Gerard D. Reilly and Joseph L. Rauh, Jr.

The theme of the conference was fiduciary responsibility in the field of labor relations. This theme explored the bargaining and grievance process, the relationship of the union to its members, and the relationship of union officials to the union and to its members. Whether unions retain the power they now have will depend upon whether the public continues to regard unionism as a proper trustee of the power delegated to it under the law. One paper points out that the proper role of individual suits is to enforce fiduciary duty, but the challenge to the law is whether giving the employee the right to seek redress himself can be done without restricting the union's freedom of negotiation. Another speaker points out that a federal law requiring registration similar to that required of issuers of securities would go a long way toward policing welfare and pension funds. Still another paper equates compulsory unionism and moral responsibilities and asks: Does the individual union member pay too high a price with his personal liberty for membership in present-type unions?

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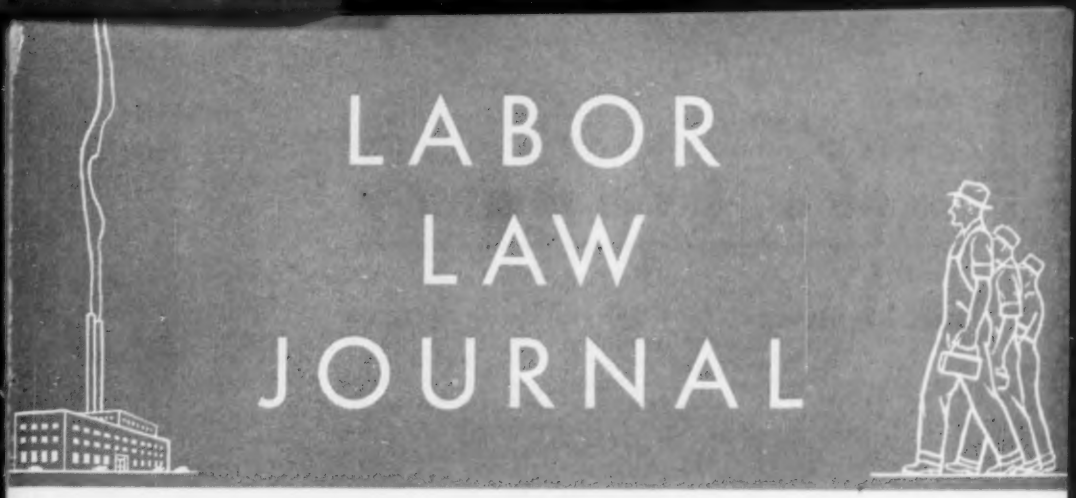

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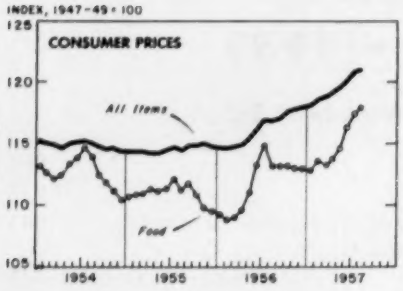
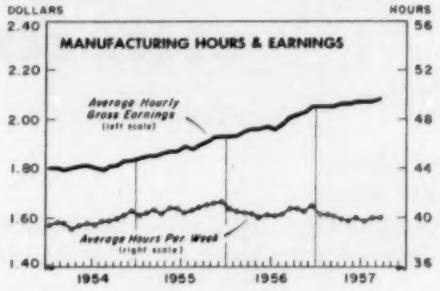
the Economy

Cost of Living

NO CHANGE. On the average, consumer prices in United States cities were unchanged between September and October, 1957, according to the Bureau of Labor Statistics. This was the first month since August, 1956, in which consumer prices have not advanced. Lower food prices were offset by price advances for other nondurable commodities and for services, while prices of durable goods were unchanged. The Consumer Price Index for October was 121.1 (1947-1949=100), 2.9 per cent higher than a year ago.





Manufacturing Wages and Hours

DOWN. Average weekly earnings in all manufacturing industries dropped about $1 in October. Average weekly earnings were $82.16. The drop may be explained by a small decrease in the workweek in October as average weekly hours per worker dropped to 39.5.

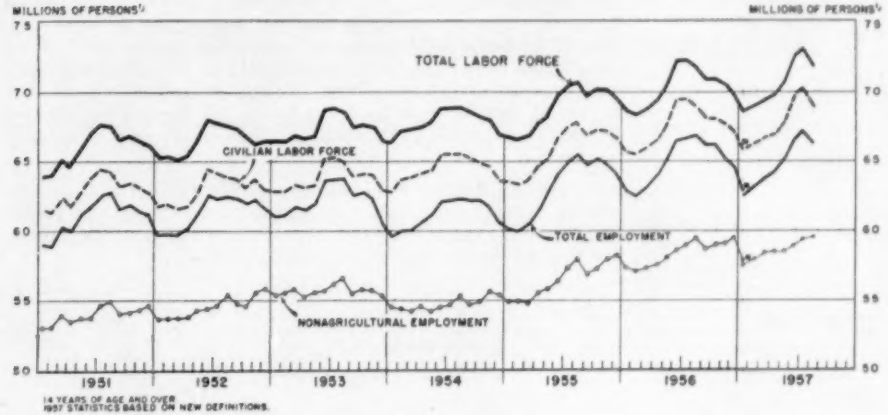
Corporate Profits

DOWN. Average weekly earnings in all manufacturing inclined almost $2 billion (seasonally adjusted annual rate) below the first quarter and stood at $42 billion. Corporate profits after taxes shrank to $20.5 billion. During the second quarter of 1956, the figures were $42.4 billion before taxes and $20.7 billion after taxes.

New corporate securities offerings continued at a high rate during the third quarter of 1957. Corporations offered $3 billion of securities during the third quarter, bringing the total for the first nine months of the year to a record $9.9 billion, $2 billion more than was offered in the same period of 1956. The record volume of securities offerings this year reflects the high level of business spending for expansion. Corporations offered $6.8 billion of securities for this purpose during the first nine months of 1957, or $2.2 billion more than in the same period last year.

Labor Force

DOWN. Total civilian employment fell in October. This decrease is attributed mainly to reductions of employees in manufacturing industries. This is according to the Federal Revenue Board, but the Council of Economic Advisers reports an increase in civilian employment. Unemployment changed little from last month. It is still about 3.7 per cent of the civilian labor force, but unemployment is greater than it was a year ago at this time.

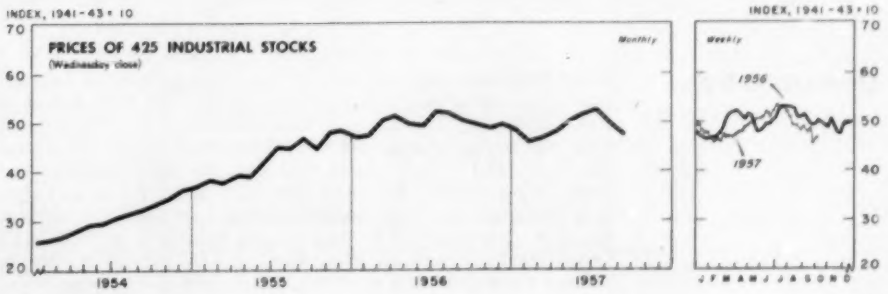


Consumer Credit

UP. Most of the September increase in outstanding installment credit was due to increases in automobile paper and personal loans. Other consumer goods paper outstanding declined moderately. The total of installment credit outstanding for September 30 equals $33,159,000,000. Consumer installment credit extended in September amounted to $3,358,000,000, and $3,244,000,000 was repaid in the same month.

Stock Prices

DOWN. The month of November saw much see-sawing of the prices of stocks on the New York Stock Exchange. While prices are some 10 to 12 points higher (Dow-Jones averages) than the low point hit in October, no general upward trend is predicted.

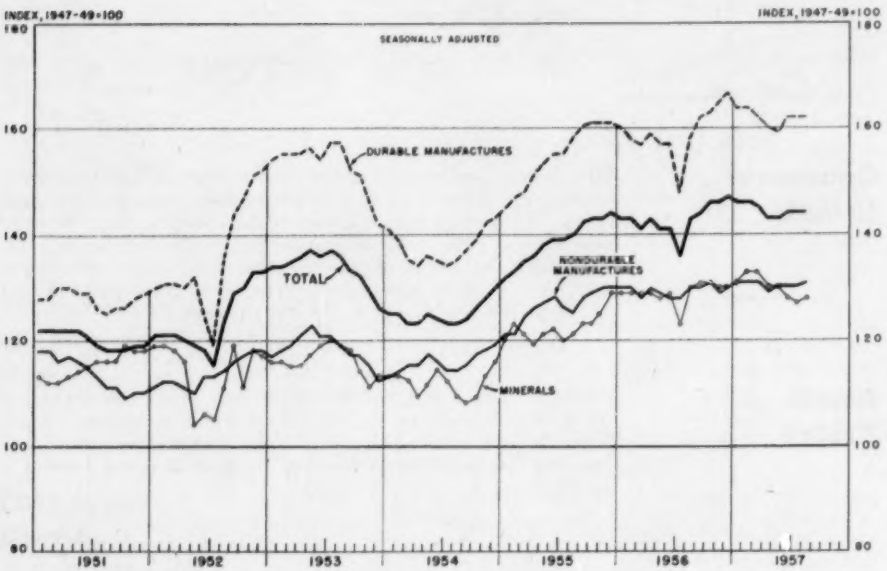


Industrial Production

DOWN. The Federal Reserve Board's seasonally adjusted index of industrial production was lower again in October. This marks a continued decline in this index. The October figure is 142, two points below September and four points below a year ago.

Steel mill operations decreased contraseasonally in October by one point, to 81 per cent of capacity. In early November, the operating rate fell to 78 per cent, and ingot production was about one fifth below a year ago. Production of construction materials was reduced in October, reflecting cutbacks in clay and glass products as well as in lumber. Generally activity in industries manufacturing producers' equipment declined further and was about 8 per cent below the spring peak. Auto assemblies were curtailed in October in part by work stoppages, but production schedules for November indicate a marked recovery from the reduced levels of the September-October change-over period. Television and furniture output continued to decline.

Over-all activity in nondurable goods industries was maintained, despite small reductions indicated in the output of textile, apparel and rubber products. Minerals production declined as the output of coal and metals declined further.



Construction

NO CHANGE. For six consecutive months, private housing starts have been steady at a seasonally adjusted annual rate of 1 million units. The value of new construction activity, however, has advanced somewhat. This seasonally adjusted annual figure is $48.3 billion. Industrial construction, however, has declined appreciably from mid-1956. The Department of Labor and Department of Commerce, however, expect that outlays for new construction will reach almost $50 billion in 1958. The Departments expect an expansion of $2.4 billion, mostly in private residential and public building and in highway work.

Labor Relations

Decisions of Courts and Administrative Agencies

"Hot cargo" clause ruled invalid to common carriers.—A union, by advising its members who were employed in the trucking industry that they could refuse to handle freight from a certain company, was found by the NLRB to have violated the Taft-Hartley Act ban on secondary boycotts, notwithstanding the existence of "hot cargo" clauses in the agreements with the truck lines. It is noteworthy that this is the first ruling in which a majority of the Board has held such a clause to be invalid. It took the position that the NLRB should adopt "an affirmative decisional rule" that a union's making of a "hot cargo" contract "constitutes *prima facie* evidence of union inducement or encouragement" of secondary boycott activity. A violation would be established when it was proved that a shipper was refused the use of a common carrier's facilities. The principal opinion stated that under the Interstate Commerce Act, an employer was not free to refrain from doing business with any individual, and, therefore, the employer could not agree to refrain from doing business by agreement with a union. In a concurring opinion, two members of the Board found it unnecessary to consider the effect of the Interstate Commerce Act in the case: One stated that "hot cargo" clauses are contrary to public policy and, therefore, invalid in all industries. The other concurring member stated that while such clauses are valid between employer and union, they may not be enforced by union appeals to employees. One member of the Board dissented on the ground that any interpretation of the Interstate Commerce Act should be undertaken by the Interstate Commerce Commission and not by the Board.—*Teamsters, Local 728,* 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 54,979.

Specific performance granted for breach of no-strike clause under LMRA.—Where a union, in disregard of a no-strike clause in its collective bargaining agreement with an employer, went

out on strike, a federal district court granted specific performance of the contract. According to the court, the federal courts under the LMRA are empowered to stop a strike which violates a no-strike clause in a union contract. In discussing the effect of the prohibitions of the Norris-LaGuardia Act, the court stated that Section 301 of the Taft-Hartley Act vested courts with jurisdiction over such labor matters as labor contract disputes, thereby overshadowing some of the prohibitions of the Norris-LaGuardia Act. The court relied upon the United States Supreme Court decision in *Textile Workers v. Lincoln Mills,* 32 LABOR CASES ¶ 70,733, which held that specific enforcement of an arbitration clause could be ordered under the LMRA. In applying the Supreme Court's principles to a no-strike clause, the district court stated: "A principal purpose of the more recent Act, the Labor Management Relations Act, 1947, not contemplated by the Norris-LaGuardia Act, was enforcement of collective bargaining agreements." As such the court construed the Norris-LaGuardia Act to apply only to those labor disputes that arise prior to the execution of union contracts. The purpose of 301, according to the court, is to bind both the employer and employee to their collective bargaining agreement; therefore, the court allowed specific performance to implement this policy.—*Bull Steamship Company v. Seafarers' Union,* 33 LABOR CASES ¶ 71,019.

Teamsters officers barred from taking office by a preliminary injunction.—James R. Hoffa and other persons who were recently elected officers of the International Brotherhood of Teamsters were prohibited, temporarily, from taking office or receiving compensation as officers by a preliminary injunction issued by the federal district court in the District of Columbia. The court found that the convention and election were fixed by a group of insiders in the union. It was found that more than half of the delegates who were seated at the convention were not selected in accordance with the constitution of the union. In the court's view, the union could not allow custom and usage to supersede the provisions of the union's constitution. Local unions under trusteeship could not send delegates to the convention since they were not in "good standing" as the constitution requires. The misconduct of the election was causing irreparable injury to the members of the union, according to the court, and there was no adequate remedy either at law or within the union. The court also found that the Norris-LaGuardia Act did not restrain the use of an injunction. The court stated that irresponsible leadership of the union threatens the common good by the possibility of obstructing "the ordinary channels of transportation and delivery throughout the United States and Canada, thus endanger-

ing substantially the entire economic structure."—*Cunningham v. English*, 33 LABOR CASES ¶ 71,038. The Court of Appeals for the District of Columbia denied a stay pending appeal.—*IBT v. Cunningham*, 33 LABOR CASES ¶ 71,052.

Union-employer ordered to remedy unfair labor practices.—A union was ordered to remedy various unfair labor practices it committed when another union tried to organize the union's office staff. The NLRB was compelled to take jurisdiction over the matter after the United States Supreme Court issued a directive that the Board could not decline the case on the grounds of a policy declining jurisdiction over nonprofit organizations. (See 32 LABOR CASES ¶ 70,675.) Domination, refusal to bargain, discrimination and interference with employee rights were among the unfair practices found by the Board to exist. The Board held that the union-employer could not act as the union representative of its employees, as collective bargaining would be impaired by the conflicting allegiances of the union. Discharging employees who testified before the general counsel was also held by the Board to be an unfair practice.—*Oregon Teamsters Security Plan Office*, 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 54,954.

T-H Bans Recognition Picketing by Minority Union

A union representing only a minority of a group of employees was held to be in violation of the Taft-Hartley Act for picketing to obtain recognition as the exclusive bargaining agent of all the employees. Thus, the NLRB made a landmark decision in the vague field of picketing. (*Curtis Brothers*, 5 CCH LABOR LAW REPORTS (4th Ed.), ¶ 54,943.) A majority of the Board held that the union's picketing violated Section 8(b)(1)(A) of the law, which forbids a union "to restrain or coerce" employees in the exercise of their rights to join in, or refrain from, group bargaining activities.

In a Board election in 1953, a union local was chosen as the representative of Curtis drivers, warehousemen and furniture finishers by a vote of 15 to 5. In subsequent bargaining, the company and the union deadlocked over the union's demands as to a union membership clause in the contract. A strike was called by the union, and picketing began in 1954. In 1955, the company requested a Board representation election; however, the union declared that it no longer claimed to represent a majority of the employees and stated that it was not seeking recognition as a bargaining agent. Notwithstanding the union's statements, the Board found the union to be seeking immediate recognition as bargaining agent and, therefore, ordered the election. The employees in this election voted 28 to 1 against the union; however, the union continued to picket. During this period, the company brought charges against the union which were the basis of this landmark decision by the Board.

The trial examiner in this case found that the union had not engaged in any unfair labor practices and recommended that the company's complaint be dismissed. The Board overruled the trial examiner on the issue of whether the picketing in any event was in violation of Section 8. The majority of the Board found that the picketing amounted to illegal coercion resulting from the union's effort to cause economic loss to the employer's business, thereby lessening the employees' financial security. The Board stated: "And the employees who choose to continue working, while the Union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like to damage to his employees. That the pressure thus exerted upon the employees—depriving them

of the opportunity to work and be paid—is a form of coercion cannot be gainsaid."

The Board went on to say that nothing in the statutory language involved limits the words "restrain or coerce" to direct pressure by the union on the employees. The loss of the employees' financial security was held to be no less damaging because it was achieved indirectly through attacking the employer's interests. Even granting that the picketing was aimed at the consumers, the Board still would hold it illegal as "coercion," for this coercion damaged the employees in that the picketing reduced the volume of business by preventing deliveries and sales. However, the union was picketing in order to obtain exclusive recognition and was thereby interfering with the employees' freedom to accept or reject a union. In the Board's view, where a union does not represent the majority of the employees and asks for recognition as the bargaining agent, the employer would be committing an unfair labor practice if he recognized the union. As such, the Board stated that the union in the present case was attempting to force the company to commit an unfair labor practice. According to the Board: "This is not the kind of activity that the Act intends to protect . . . . To subordinate whatever 'right' there may be to picketing for an *unlawful* object, to the right of employees subjected to that picketing to be free from the coercion inherent in all picketing, is not a delicate question but an obvious must." The Board reserved ruling on the question of whether picketing by a minority union, only for the purpose of organizing the employees, violates the act.

One of the members of the Board concurred in the majority opinion but limited his concurrence to situations where the union had been rejected in a board representation election.

Another member of the Board dissented on the ground that the majority's decision amounted to "an amendment of the Act." The dissenting member stated that Section 8 was not intended by the legislature to apply to peaceful picketing but to illegal means, such as the use of threats and physical force and mass picketing which physically bars employees from work. He went on to say that the majority's theory of illegal coercion is "so extreme as to render all picketing unlawful . . . and all pickets unprotected by Section 8(a)(3)."

It is noteworthy that as far back as December, 1952, the LABOR LAW JOURNAL in its "Developing Law" section had a lengthy comment on recognition and organizational picketing, written by Professor Sylvester Petro, that predicted the NLRB's decision exactly. In fact, the reasoning and theories behind the Board's decision were the same as his comments. In discussing the harm of minority union picketing, the article stated: "When a minority or stranger union pickets for immediate recognition it imposes . . . economic harm which cannot possibly find justification under the national policy which has dominated labor relations since 1935. Such a union seeks in effect to secure bargaining status without the representative status which lies at the core of national labor policy. It seeks to impose itself upon employees as their bargaining representative whether or not they wish it to be such. . . . Such a defiance of the national policy is sufficient in itself to eliminate the possibility of a justification for the deliberate infliction of economic harm which all picketing entails." As to the effect of the employer being forced to recognize such a union, the article stated: "If an employer should recognize a union as exclusive bargaining representative of his employees when the employees themselves have not designated the union as such, the employer has quite evidently coerced or restrained them in their choice of bargaining representatives; when the employer has made the choice, the employees are at a definite disadvantage in making a different one of their own. Under any reading of the National Labor Relations Act, such conduct on the part of the employer adds up to the unfair labor practice of restraint or coercion of employees. . . . Accordingly, minority or stranger picketing for recognition appears as an attempt to compel the employer to commit an unfair practice." The article also discussed the question which the Board reserved ruling on and stated: "That critical point is the one which the minority or stranger union has as its objective, not immediate recognition of itself as exclusive bargaining representative but, simply, organization of the employees involved. In 'organizational picketing' the union deliberately inflicts economic harm upon the employer as a means of inducing the employees to become members and to choose the picketing union as exclusive bargaining representative. This type of picketing, like recognition picketing, beyond any doubt amounts to a deliberate infliction of harm, in fact, upon *both* the employer and the reluctant employees; . . .

(Continued on page 905)

The University of Chicago
Law School

Conference on Fiduciary Responsibility in Labor Relations

October 11, 1957

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IN LABOR RELATIONS, as elsewhere, problems of fiduciary responsibility accompany group activity and the delegation of authority which it necessarily involves. The power which accompanies this authority outlines the importance of defining and implementing appropriate fiduciary standards in labor relations. The important issues raised by attempts to give vitality to the ancient ideal of fiduciary responsibility invites serious public discussion. This purpose and this theme are the *raison d'être* of the papers which were presented at the Conference on Fiduciary Responsibility in Labor Relations.

CHAIRMAN of the conference committee was Sheldon Tefft, a member of The University of Chicago Law School faculty. Other professors of law of the university who served on the committee were Francis A. Allen, Walter J. Blum, Allison Dunham, Philip B. Kurland and Bernard D. Meltzer. James M. Ratcliffe, assistant dean of the university's law school, was executive director.

Fiduciary Standards and the Bargaining and Grievance Process

By CHARLES O. GREGORY

The author is professor of law at the University of Virginia Law School.

BEFORE the Railway Labor Act of 1934 and the Wagner Act, labor unions were strictly private groups. If their membership policies resembled those of most country clubs, that was their business and nobody else's. But these statutes vested unions with exclusive representational rights in bargaining units. From that time their character as private clubs appears questionable. They seem, rather, to have become quasi-public organizations. Nevertheless, many of them have remained as they were, and Congress and the courts have been slow to improve the situation.

The Negro cases best illustrate what I mean. In the *Steele* case,[1] a railroad and a brotherhood representing engineers and firemen arranged for the promotion of white firemen ahead of Negroes. Their object was to prevent Negro firemen from becoming locomotive engineers. Here was an abuse of a trust which had been placed in the union's hands by Congress when the brotherhood was given exclusive representational rights over all employees in the bargaining unit. The Supreme Court held that if the union was to have this statutory power, then it must exercise it impartially. Were the statute to be otherwise construed in this case, Chief Justice Stone declared, it would be unconstitutional.

So far, so good—but not good enough. Implicit in the *Steele* case is the assumption that unions are still private organizations, with the right to exclude Negroes from membership. The Court fully recognized the majority-rule principle and it conceded that unions may lawfully bargain with employers to subordinate the rights of some unit employees for the common good. But it held simply that they cannot do so for arbitrary reasons, such as race and religion.

If unions owe their genesis and broad powers to our laws, it seems pretty clear that they must admit to membership all employees whom they represent. Before 1947 it was clearly established that unions could not have a closed shop and a closed union at the same time. The Supreme Court's *Wallace* case[2] and the Board's *Larus* case[3] show this. Indeed, the *Larus* case goes further. Also, the *Marinship*[4] and *Williams*[5] cases in California indicate that unions cannot circumvent this policy by providing Jim Crow work permits in the form of auxiliary unions. Since the passage of Taft-Hartley and the more recent amendment to the Railway Labor Act, labor organizations with union-shop contracts must either admit all employees or put up with them as nonunion fellow workers if they don't want them as members. Thus, the employment opportunities and jobs of Negroes are protected, but they are not assured a voice either in bargaining out their conditions of labor or in administering the contract provisions reached by the parties.

In *Betts v. Easley*[6] it was argued that the Negro employees in a railroad workshop had a sufficient opportunity to participate in union affairs by voting at the election

[1] *Steele v. Louisville & Nashville Railroad*, 9 LABOR CASES ¶ 51,188, 323 U. S. 192, 65 S. Ct. 226 (1944).

[2] *Wallace Corporation v. NLRB*, 9 LABOR CASES ¶ 51,187, 323 U. S. 248, 65 S. Ct. 238 (1944).

[3] *Matter of Larus & Brothers Company*, 62 NLRB 1075 (1945).

[4] *James v. Marinship Corporation*, 9 LABOR CASES ¶ 62,475, 25 Cal. (2d) 721, 155 Pac. (2d) 329 (1944).

[5] *Williams v. Boilermakers*, 10 LABOR CASES ¶ 62,953, 27 Cal. (2d) 586, 165 Pac. (2d) 903 (1946).

[6] *Betts v. Easley*, 11 LABOR CASES ¶ 63,207, 161 Kan. 459, 169 Pac. (2d) 831 (1946).

when the union was chosen. Thus, they were free to vote against it or for another union of their choice—a frustrating alternative for a minority group. But when the all-white union won the election and was certified, the Negro workers ceased to have anything further to say. They could not attend the union meetings to vote on contract proposals nor could they participate in voting for offices. Needless to say, they were not eligible for office or to serve on committees, since they were not even members. When they sued the brotherhood and its officers for injunctive relief, the Kansas Supreme Court granted it.

The court's position was that the brotherhood was not merely " a private association of individuals." Rather, it was "an agency created and functioning under provisions of Federal law." Therefore, the court observed, "it is unnecessary to consider . . . [the brotherhood's] contention that the fifth amendment is not here applicable because it relates only to action by the Federal Government and not to acts of private parties." Nor would the court listen to the argument that, since membership in the union was not compulsory, the Negro workers had no reason to complain. Noting that Congress had recognized the general necessity for collective bargaining and had provided an opportunity for workers to act collectively, the court declared that a union created by statute could not deny them this right. Recently, in a similar case[7] the Wisconsin Supreme Court denied relief to competent Negro masons. They could not obtain work because they did not belong to the union and they were refused membership in the union because of their race. Wisconsin has a fair employment practices act, but it is only a statement of public policy and has no teeth as does the New York statute. Hence, the Wisconsin court concluded that the state legislature did not intend to prevent unions created and functioning under its laws from denying membership because of an applicant's race. One justice dissented, insisting that the court was obliged to grant relief under the Fourteenth Amendment. His position resembles that taken by the Kansas court in *Betts v. Easley*.

We know from the *Corsi* case[8] that a state legislature may constitutionally compel unions to admit all qualified employees who apply for membership. But if such statutes are not generally enacted, may not our courts grant relief under the Fifth and Fourteenth Amendments? On this the Supreme Court has remained silent. But it has held that a southern state may not by default hand over the function of conducting political primaries to a private all-white organization called the Jaybird Association.[9] Also, it had previously refused to review a federal appellate court's decision that the Democratic Party in South Carolina—an unofficial organization—could not exclude Negroes from voting in primary elections.[10] This analogy may seem far-fetched, but the trend of our times indicates otherwise. Labor unions have virtually become quasi-public administrative agencies, endowed with great powers by statute. As such, they have assumed a position of trust toward workers, which they must discharge. If our legislatures refuse to make them accept this responsibility, then I submit that our courts can and must do so.

PART II

The fiduciary relation of unions toward workers arises in several situations where the membership rolls are open to all employees. When a bargaining unit is created and a majority of the employees voting select a union, it becomes the exclusive representative of all workers in that unit. Presumably there are employees who preferred another union. Among them are specialized workers who believe that a union representing all the employees will not adequately serve their particular interests. Many employees may not have wanted any union at all. Of these, some feel capable of getting what they want by individual bargaining. Others may just not like unions. They may be unwilling to knuckle under to them or be beholden to them in any way. Several may just be unwilling to pay the initiation fee and dues. A few may have religious scruples about joining any secular organization. On the other hand, a union which becomes a bargaining representative in a unit presumably has the backing of the majority of the employees. Those who did not want it had their chance to vote against it. But the majority rules under our labor acts, and the union's policies prevail as long as it continues to have the support of the majority.

This does not mean, however, that the union's function is to achieve benefits only

[7] *Ross v. Ebert*, 32 LABOR CASES ¶ 70,627, 275 Wis. 523, 82 N. W. (2d) 315 (1957).

[8] *Railway Mail Association v. Corsi*, 9 LABOR CASES ¶ 51,215, 326 U. S. 88, 65 S. Ct. 1483 (1945).

[9] *Terry v. Adams*, 345 U. S. 461, 73 S. Ct. 809 (1953).

[10] *Rice v. Elmore*, 165 F. (2d) 387 (CCA-4, 1947), cert. den., 333 U. S. 875, 68 S. Ct. 905 (1948).

for employees who voted for it and maintain it. Its duty is to secure a high and uniform standard of employment conditions for all employees in the bargaining unit—union members or others—and it must administer the contract provisions impartially for the benefit of all employees in the bargaining unit, regardless of their relationship to the union. If the unit includes minority groups of highly skilled or specialized workers, the union is obliged to represent their interests fairly, even if they don't belong. This presents practical difficulties. First of all, an industrial union may not understand and be able to promote the interests of skilled craft groups. While most of such unions have undoubtedly acquired this ability, those who have not must do so. If they do not, the Board should enable such minority groups to choose their own unions or go nonunion.

However, an industrial union may be less concerned with the interests of minority skilled groups than it is with securing advantages for the bulk of the workers. Such an attitude, of course, is a virtual breach of trust. Naturally, unionism is inherently political, and union officials respond to pressures from those who control the most votes. Acting impartially for the best interests of all may become a serious strain where some of the employees involved are not members of the union, for it is easy to neglect the interests of those—especially minorities—who do not provide financial support for the organization. At the same time, it may be to a union's self-interest in the long run to win the backing of such employees by securing advantages for them.

Actually, however, the union's integrity in bargaining for basic provisions is seldom affected by nonmembership of unit employees. That is because the union sets out to establish uniform standards throughout the unit. Contract provisions such as those governing vacations, paid holidays, overtime, pensions, and benefits depending on seniority apply to all alike; rate increases and adjustments pertain to jobs and work, regardless of who fills the jobs or performs the work. Naturally, unions are tormented by the fact that many employees are free riders—people who benefit by union standards without paying initiation fees and dues. But no union would dream of bargaining out lower standards for such employees, even if they could lawfully do so. That would be tantamount to maintaining nonunion working conditions alongside higher union standards. Presumably, Congress vested unions with exclusive representational rights in order to obviate this very thing in open shops. Even if unions were foolish enough to want double standards of this sort, they would be attaching a significance to union membership which is unlawful under the labor act.

Assume, then, that contract provisions are uniform in an open shop. It is still possible that unions might undertake to bargain out additional clauses—or reach off-the-record understandings—to the effect that union members be preferentially treated. Thus they would be favored in promotions, the assignment of extra work and overtime rates, first choice for vacations, and even being kept at work during layoffs. Administration of contract provisions in this fashion, instead of on an impartial seniority basis, would be unlawful under the NLRA. For that reason alone, if for no other, unions attempting to bargain out special treatment for members, either openly in the contract or in its practical day-to-day administration, presumably expose themselves to charges of breach of trust. But they can achieve exactly the same results in most parts of the country by bargaining out a union-shop contract. These attempts at special treatment of union members probably occur only in states where the union shop is unlawful or, conceivably, in other places where the union is not strong enough to get the union shop through bargaining.

But that is not necessarily so. Indeed, I recall one contract (that between the Milwaukee brewers and the CIO Brewery Workers) where, under the traditional closed shop, a rotation-of-work plan had been used to spread the effects of periodical seasonal layoffs among all of the unit employees. After Taft-Hartley, they had a union shop. Thereupon the union abandoned the rotational share-the-work plan and insisted on layoffs by reverse order of seniority. This was a very complicated case that I arbitrated some years ago.[11] I never could determine for sure what underlay the union's attitude. But I gathered that the officials and older men were reluctant to share work with any employees except those whom they alone could make eligible for hiring. Under the union shop, the employer made the selection of employees, and the union took the dues of anybody the employer hired. Of course, this was hard on those younger employees to whom the union would gladly have offered membership in the closed-shop days. But that's the way it was. The Mil-

[11] *In re Pabst Brewing Company and Local 9, BFCSD (CIO).*

waukee arrangement was certainly lawful, since seniority layoffs applied to all relatively junior employees alike. Was it a breach of the union's trust toward the junior employees? I thing it was not, any more than any seniority rule is.

Let us return to the open-shop situation and the union's position relative to unit members. It seems natural to suppose that a union would always do more for its members than for nonmembers in a bargaining unit. They are the ones who selected it, who want it there and support it with money. If, because of some state law or lack of strength, the union is not able to bargain out a union-shop contract, then this issue of conflicting loyalties is unavoidable. Nevertheless, the union must serve all unit employees impartially, union or nonunion.

I have always sympathized with the widespread feeling that this was unfair. By bargaining out uniform standard provisions, the union presumably benefits nonunion unit employees. Then it is expected to service the contract for the benefit of such employees as well. For this the union gets nothing in return from them. Indeed, as between two identically rated employees doing the same work—one a union member and the other not—the nonunion employee's yearly take-home is substantially larger than the other's. The difference is the amount of the fees and dues paid the union by the former.

In view of such apparent injustice, is it not asking a good deal of the union to bargain advantages for nonunion employees and to administer the contract in their behalf? Do not these considerations argue for Congressional action, allowing the union shop throughout industry or, at least, to permit or require clauses in contracts to the effect that all nonunion unit employees must pay the equivalent of ordinary union dues and fees in a universal checkoff, whether or not they join the union? In this way, at least, the union would be repaid for what it did to benefit nonunion unit employees.

This is a real poser, and I certainly do not know the answer. All I do know is that unions got a real break when the Wagner Act gave them exclusive bargaining rights in open-shop bargaining units. Certainly they wanted that right of complete representation. Attached to this power was the duty to serve all employees alike, plainly a fiduciary obligation. Now I do not wonder that unions complain about free riders. Also, I feel sure that opposition to the union shop or the universal checkoff is primarily intended to prevent unions from becoming stronger. From the union position it may well be true that the grant of power implicit in exclusive representation and the majority rule is an imperfect arrangement. But it does not necessarily follow that the next step must be 100 per cent unionism or 100 per cent financial support of unions. First of all, we cannot assume that all nonunion employees actually *are* free riders—that they get benefits from unions that they would not otherwise enjoy. Then, again, we must recognize that some employees do not want to be represented by unions and certainly do not want to join them, regardless of what benefits they may receive through them. Unless we analogize unions to ordinary political government and agree that they are equally necessary (which I think is not so), we cannot act on the assumption that nonunion unit members are always benefited and should be made to pay their way, as all citizens must pay taxes.

This leads us into speculation about whether unions and collective bargaining serve any useful or necessary purpose at all. In spite of sentiments—cherished by many whom I respect—that they don't, I prefer to continue believing that they do, without arguing the point. At any rate, we now have pervasive unionism, and it seems to me a waste of time to speculate on the possibilities of not having unions generally. But I am worried about such things as compulsory joining of unions, even under a union-shop contract. I am inclined to the view that if employees under union-shop arrangements tender their fees and dues, they should not be obliged to join.[12]

While I believe that a nonunion employee represented by a union has a right to ask and receive as much service from the union as its members get, I also believe that the union is not entitled to his loyalty if he does not wish to give it. Naturally, an employee who may join the union, but prefers not to, cannot complain that its basic policies are determined and bargained without his participation, for he may join at any time and participate. If he does, I think it absurd to suppose that his loyalties are completely engaged with the union. Thus, the idea that a union may discipline a member who testifies for the company at an arbitration hearing is, to me, utterly abhorrent. Indeed, the deprivation of membership for such conduct

[12] See *Matter of Union Starch & Refining Company*, 87 NLRB 779 (1949), enf'd in 19 LABOR CASES ¶ 66,152, 186 F. (2d) 1008 (CA-7, 1951).

is more compatible with the country-club concept of unions than with the fiduciary role they must play today. Likewise, I believe that unit members under a union-shop arrangement must remain free to agitate for another union, still retaining their right to impartial representation from the incumbent union.

Another strain is placed on a union when it is asked to service the grievance of a nonmember unit employee in an open shop. This is difficult enough under any circumstances. But it becomes worse when it means arbitration and the expense that that may entail. Recently, in a discharge case I was arbitrating, I heard counsel for an employer ask counsel for the union if the grievant belonged to the union. The reply was: "Do you think we'd be here if he wasn't?" I prefer to think that this response was made in jest, for if it was not, it was inexcusable. Yet we must all acknowledge that a union is put in a delicate practical position in such a case.

This can be particularly embarrassing in seniority grievances. There the union's duty may be to secure an award in favor of a nonunion grievant when the job in issue had originally been assigned to a union member. It would be impossible to convince most union people that their organization is nevertheless obliged to fulfill this duty and to spend its money doing so. Nevertheless, this duty does exist. But unions are seldom, if ever, faced with such practical dilemmas.

A situation where unions occasionally violate their fiduciary relationship to employees is where they encourage the prosecution of hopeless grievances when they should either advise the grieving employees that they have no case or simply refuse to process the grievances. Professor Cox[13] will no doubt tell you that part of a union's necessary power is to be free to exercise its judgment in deciding what grievances to push and what to throw out. I have heard arbitrations of grievances that obviously never should have got beyond the first step. It is cruel to the employees concerned to hold out false hopes and it is a waste of the union's money to arbitrate such cases. I even know of a local union that offered prizes to the employees who filed the most grievances in a given period! On the other hand, I arbitrated for some years under contracts between the same employer and two unions. Under one contract, my ratio was about eight to one for the employer. Under the other, it was better than 50 per cent for the union. Needless to say, the latter union more faithfully discharged its trust in weeding out poor grievances and refusing to arbitrate them.

Another unfortunate aspect of this abuse of trust occurs where a union permits an employer to spend time and money preparing cases for arbitration when the union has no intention of going through with them, and withdraws them at the last moment. To me this is letting the membership down just as badly as when the union calls an improvident strike, for it builds up a backlog of ill will with the employer that can boomerang in the future.

It is probably not within the scope of my paper to discuss the fiduciary position of the union with respect to funds within its control. But it is difficult not to refer, in passing, to the political expenditures of unions to keep their friends in office and keep their enemies out. In spite of the Taft-Hartley prohibitions against this,[14] I would expect most people to agree that the spending of union money to support political candidates is not a breach of a fiduciary obligation, since it is for the general good of the union. At the same time, I realize that all members of all unions do not belong to the same political parties and that a Republican may hate to see his money help to elect a Democrat. I also recognize that such use of union money may properly be outlawed on other policy grounds, such as those underlying the original Hatch Act.

In summary, there can be no doubt that in bargaining and administering collective agreements, unions accept a trust toward all unit employees when they assume the statutory power of exclusive representation. The majority rule concept enables them lawfully and morally to sacrifice the interests of some individual employees for the common good, to be sure. But such compromises must be impartially made and not at the expense of employees who are excluded from membership in the union or who do not choose to join or contribute financial support under a contract not oblig-

[13] See his splendid article in Cox, "Rights Under a Labor Agreement," 69 *Harvard Law Review* 601 (1956).

[14] See *U. S. v. CIO*, 15 LABOR CASES ¶ 64,586, 335 U. S. 106, 68 S. Ct. 1349 (1948); and *U. S. v. UAW, CIO*, 32 LABOR CASES ¶ 70,534, 352 U. S. 567, 77 S. Ct. 529 (1957). It is possible, of course, that unions do not make contributions of this sort out of their general funds, but only out of money solicited from, and voluntarily given by, members.

ing them to do so. I have refrained from discussing the fiduciary obligation of unions to conduct their internal affairs honestly and impartially. Naturally, it must be recognized to exist. But a discussion of this matter would take us far afield. Suffice it to say that here, again, as we abandon the country-club concept of unionism in favor of the quasi-public administrative-agency notion, the conducting of internal union affairs becomes a matter of general concern, subject to regulation by law if necessary.

PART III

A lot of talk is heard about the duties that unions owe to employees. Unless this comes from the employees themselves, however, I suppose a certain amount of it should be suspect. Certainly, when a union's own employees complain, it is time to listen. When the Teamsters' employees can pin Section 8(a)(1), (2), (3) and (5) charges on their employer and make them stick, with an assist from the Supreme Court,[15] we can be sure that a union is following a double standard.

What most people worry about, however, is how union power affects the public interest. I have students in Virginia who get upset because unions are permitted to focus harmful economic pressures against employers. They begin with the assumption that all employers are dedicated to the public interest—that what is good for employers is good for the country. Hence, any union activity that disrupts business is bad. Unfortunately, there seems to be no way in which unions can make their wishes articulate except through direct pressure on employers. At the same time most of the manifestations of union activity focused against employers are ultimately felt by consumers and occasionally result in real inconvenience to the public in general.

Under our present law it is difficult to understand how a union can any longer lawfully move in on an employer to exert organizational pressure against him. Organization is now a matter for employees alone to pass on. Naturally, it is not as simple as that. We must expect unions to sell themselves to employees, just as an up-and-coming manufacturer sells his product to the public. But coercion is another thing. Some unions are now sufficiently powerful to exert terrific pressure against employers and their employees to grant recognition. This course of conduct, and the practices implementing such pressures, seem plainly to be an abuse of the power entrusted by Congress to unions. Such practices can be tolerated, if at all, only as an offset against the systematic course of conduct in which many employers unlawfully engage under the labor act to frustrate the wishes of their employees to organize. Just when harmful union organizational practices may be justified on these grounds, if at all, is perhaps difficult to determine.

A more critical aspect of the alleged abuse of union power occurs in connection with bargaining pressure. We cannot doubt for a moment that Congress intended unions to have the economic power with which to exact from industry directly—and from society in general, through industry—a greater proportionate share of the national income for workers than a free-market system would afford them. Hence, I do not see how the lawful use of this power by unions through purely economic pressure can possibly be condemned as an abuse of a public trust, regardless of the consequences. The grant of such power in the first place can certainly be questioned, but if this power is given by law, its use is certainly proper.

In our times, however, it seems extraordinary that anyone can seriously debate the legality and morality of certain coercive union bargaining practices. I cannot understand why anyone today should contend that picketing and other harassing activities which *physically* interfere, during strikes, with workers entering plants and with continued production and service could be regarded as either lawful or moral. Unions have a powerful legitimate bargaining weapon at their command. It is the concerted withholding of labor—the simple strike. Incident to that is truly peaceful picketing, which does not physically interfere with the ingress of workers and goods into the struck plant. Even sympathetic responses to peaceful picketing from the employees of the suppliers and customers of the struck employer are understandable; the refusal of employees of other employers to handle or work on the products of the struck employer can be tolerated if some economic interest of theirs is directly promoted and they are not acting just out of sympathy. But beyond these limits, bargaining pressures seem to be an abuse of power under our existing laws and, hence, are an abuse of a public trust.

[15] *OEIU, Local 11 v. NLRB*, 32 LABOR CASES ¶ 70,675, 353 U. S. 313 (1957).

I suppose it is argued that some of the indefensible union bargaining practices are aimed only at private employers and, therefore, do not affect the public interest. The answer to this is that the consuming public is always affected. To the extent that the use of union power for bargaining is peaceful and lawful, society has agreed to put up with the costs. But it has not officially undertaken to tolerate any more than this. As our law now stands, industry-wide bargaining and industry-wide strikes are acceptable, although some trouble about unions' refusing to bargain at the local level has already developed and promises to recur. Such strikes inevitably affect the public interest, but they do not inconvenience the public directly unless they are in industries like railroads, telephones, and other utilities, or tie up ports like New York. Under our present law, as construed by the Supreme Court,[16] some unions are still getting away with flagrant abuses of power in featherbedding activities.

The tragic thing about power is that its boundaries can be set only after its abuse suggests where they must be drawn. Even then, as the featherbedding cases indicate, it occasionally seems impossible to articulate, in words, clear limits to the use of union power. The upshot of continued abuse of union power, or of its normal and lawful use either in certain sensitive areas or on too wide a scale, poses a real dilemma: Should unions be placed again under the antitrust laws or should they be left with their power and have its use curtailed by enacting legislation designating a series of practices which are made unlawful? Either course implies that union conduct presently lawful under our prevailing statutes threatens an abuse of the power entrusted to unions by Congress.

As a member of the Attorney General's Committee on the Antitrust Laws, I took the position that unions should remain exempt from the coverage of such laws, except in situations like the *Allen-Bradley* case,[17] where an embargo was erected against the importation of goods, union-made or non-union-made, into a market area. My feeling was that labor unions themselves are restraints of trade which are monopolistic by nature and that they have to be if they are to continue functioning. Hence I thought it would be paradoxical to subject them to laws aimed at restraints of trade and monopolies, for I believe it idle to suppose that unions are going to be broken up or abolished. My proposal to the committee was that Congress accept unions as they are, carefully defining specific abuses of power. Then it should outlaw such abuses in clearly stated amendments to the Taft-Hartley Act. I am sorry to say that my position was voted down, 58 members out of 62 being in favor of letting the federal courts go after the unions directly under the antitrust laws.

I cannot understand why labor objects so strenuously to being brought under antitrust laws. It will not interfere with labor's strength. It will not diminish its prestige. It will do nothing to hurt the labor movement.—From an address by President Philip M. Talbott of the Chamber of Commerce of the United States.

I still think I was right in the position I took. But I am inclined to feel that it may be only a question of time before union power, enhanced by the increasing size and scope of union organization, may have to be dealt with directly under the antitrust laws. Whether or not this happens, of course, is largely up to the unions themselves. They are now entrusted with economic power intended to be used to promote the interests of workers. To what extent this power should or should not be used, and to achieve what ends, is left completely open. Even after specific practices are made unlawful, many unions will still retain great economic power that increases with the growth of their organizations. Even now it is conceivable that the use of purely economic bargaining pressures by unions representing public-utility workers should be curtailed or be eliminated altogether, with recourse to arbitration as the alternative. Certainly, if unions employ their power to get more than the public thinks is fair or inconveniences the public too much in the process, they will be asking for trouble. Whether or not they get it depends on whether the public continues to regard unionism as a proper trustee of the power delegated to it under our law.

[The End]

[*See page 887 for a comment on Mr. Gregory's paper by George B. Christensen.*—Ed.]

[16] *American Newspaper Publishers' Association v. NLRB*, 23 LABOR CASES ¶ 67,436, 345 U. S. 100, 73 S. Ct. 552 (1953); *NLRB v. Gamble Enterprises, Inc.*, 23 LABOR CASES ¶ 67,437, 345 U. S. 117, 73 S. Ct. 560 (1953).

[17] *Allen-Bradley Company v. Local 3, IBEW*, 9 LABOR CASES ¶ 51,213, 325 U. S. 797, 65 S. Ct. 1533 (1945).

Individual Enforcement of Collective Bargaining Agreements

By ARCHIBALD COX

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IN arranging terms and conditions of employment, the national labor policy has cut the direct line between the employer and individual worker and has vested exclusive power in the bargaining representative, subject to the duty to represent all the employees in the unit fairly and without hostile discrimination. It is an unfair labor practice for an employer to bargain with individual employees concerning terms or conditions of employment.[1] The collective agreement negotiated by the union binds the individual worker even though both he and his employer might prefer a different arrangement. An individual contract is ineffective both as a bar to collective bargaining[2] and as a waiver of prospective benefits under a subsisting contract.[3] "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ."[4]

Professor Gregory has discussed these powers and the resulting legal and moral responsibilities of labor unions. The fundamental question respecting the role of individual suits for breach of contract is whether the law should make the same distribution of power in the enforcement of collective bargaining agreements as in their negotiation.[5] If claims based upon an existing contract are more personal and there is greater danger of unfairness to individuals, the law can protect them by allowing any employee to sue for losses resulting from violation of the collective agreement, without the assent of the union. On the other hand, if the bargaining representative should have full power to enforce labor contracts and to make binding adjustments of grievances, then individual suits must be restricted to situations in which the union has failed to represent the individuals fairly.

A few illustrations may clarify these abstractions. Several employees of a basic steel producer were subpoenaed by the House Committee on Un-American Activities and asked whether they were members of the Communist Party. They refused to answer, citing the Fifth Amendment. There were other allegations that they were security risks. The company discharged them. Grievances were filed, complaining that there was not "just cause" for the discharges. United Steelworkers prosecuted the grievance through several stages without securing relief, but then informed the employees that it would not carry the issue to arbitration. Is this the end of the matter or can the employees bring individual suits either to compel arbitration or to secure an adjudication upon the merits?[6]

[1] *Medo Photo Supply Corporation v. NLRB*, 8 LABOR CASES ¶ 51,176, 321 U. S. 678 (1944).

[2] *J. I. Case Company v. NLRB*, 8 LABOR CASES ¶ 51,173, 321 U. S. 332 (1944).

[3] *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 8 LABOR CASES ¶ 51,174, 321 U. S. 342 (1944).

[4] *Steele v. Louisville & Nashville Railroad*, 9 LABOR CASES ¶ 51,188, 323 U. S. 192, 202 (1944).

[5] Much of this paper is a summary of my earlier article, "Rights Under a Labor Agreement," 69 *Harvard Law Review* 601 (1956), where the authorities are analyzed in considerable detail. Footnote 11 there collects the earlier secondary authorities. For a later discussion, see Howlett, "Contract Rights of the Individual Employee as Against the Employer," 8 *Labor Law Journal* 316 (May, 1957).

[6] If the union had carried the case to arbitration, the discharge might have been held to be without just cause. Compare *Pratt & Whitney Company* (1957) with *Bethlehem Steel Company* (1955). The leading judicial decision is unfavorable to the employees on the merits (*United Electrical Workers v. General Electric Company*, 27 LABOR CASES ¶ 68,885, 127 F. Supp. 934 (DC D. of C., 1954), aff'd on other grounds, 30 LABOR CASES ¶ 69,839, 231 F. (2d) 259 (CA D. of C., 1956)).

For a second example (to which I shall return periodically)[7] let us suppose that one Johnson, a carpenter in a plant-wide unit covered by a collective bargaining agreement, was called out to do maintenance work on a high roof on Labor Day, 1955, as a result of hurricane damage. He worked from 7 a. m. to 7 p. m. His usual rate of pay was $2 an hour. The collective bargaining agreement contains these provisions:

Eight hours' work between the hours of 8 a. m. and 5 p. m. shall constitute the regularly scheduled workday.

All work in excess of eight hours a day and work performed outside of the regularly scheduled working hours shall be paid for at time and a half the regular rate of pay.

When maintenance men are required to perform work at heights above 50 feet, they shall be paid double time.

Double time shall be paid for all work on the following holidays: New Year's Day, Memorial Day, Labor Day.

If the company paid Johnson $4 an hour for his work, Johnson might contend that he should have been paid $8 for each hour between 8 a. m. and 5 p. m. and $16 for each hour between 7 and 8 a. m. and 5 and 7 p. m.—a total of $112.[8] The union might press the full claim, which is not an absurd interpretation of the words, or it might conclude that to demand a pyramiding of premium payments not contemplated during contract negotiations would exacerbate labor-management relations. Perhaps the union would take an intermediate position, claiming $8 an hour but not seeking to pyramid the overtime and before-and-after-regular-hours premiums. If the union cannot negotiate a satisfactory adjustment, may it bring an action for breach of contract? If the union and the employer reach a compromise but Johnson is dissatisfied, may he bring an individual action? Or suppose that the union simply declines to press the grievance on the ground that it is unwarranted. Can Johnson maintain an action?

There are three possible answers to these questions: One is to say that the claim belongs to Johnson who alone can sue or compromise. A second is that either Johnson or the union may sue but that no legally binding adjustment of the grievance can be made without the approval of both Johnson and the union. The third is that the union might be given sole power to enforce or settle.

II

The National Labor Relations Act gives no answer to the critical questions. Sections 8(a)(5) and 9(a) of the National Labor Relations Act require an employer to bargain with the designated union as the exclusive representative of all the employees in the bargaining unit except that "any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative."

Some lawyers believe that this proviso gives employees a legal right which prevents a union and employer from settling grievances without the assent of the individuals affected,[9] but there are also plausible reasons for concluding that the proviso merely qualifies the employer's duty to bargain with the union by permitting him to discuss grievances with individuals if he chooses.[10]

The existing case law is also indecisive. Under the *Lincoln Mills* case,[11] the point must be decided as a question of substantive federal law. State decisions are not controlling and, although they may sometimes be

[7] The example is taken from a situation which arose in New Hampshire several years ago, but I have added a number of fictitious flourishes in order to sharpen the issues.

[8] The computation is: Straight time rate equals $2; for high work, double "the established rate" equals $4 an hour; double time for the holiday equals $8 an hour. Eight hours at $8 an hour is $64. An additional 50 per cent of this regular rate for each hour in excess of eight hours plus another 50 per cent for work before 8 a. m. and after 5 p. m. yields another three hours at $16 an hour—$48. The total for the day is therefore $112.

[9] *American Bar Association Section of Labor Relations Law, Proceedings*, pp. 33, 62-63 (1954); Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," 50 *Columbia Law Review* 731 (1950). The National Labor Relations Board has interpreted the proviso to mean that individual employees must be permitted to present grievances at every stage of the grievance procedure, including arbitration (*Hughes Tool Company*, 56 NLRB 981, 982-983 (1944)). This interpretation is contrary to court decisions holding that an individual employee has no standing to compel arbitration. See authorities cited at footnote 32.

[10] Opinions of the General Counsel, Case No. 317, CCH Labor Law Reports (4th Ed.), Vol. 2, ¶ 3785.1015 (1952), and Case No. 418, CCH Labor Law Reports, (4th Ed.), Vol. 2, ¶ 4095.142 (1952). See also *General Cable Corporation* (1953). The argument is summarized in Cox, work cited at footnote 5, at pp. 623-624.

[11] *Textile Workers Union v. Lincoln Mills of Alabama*, 32 LABOR CASES ¶ 70,733, 353 U. S. 448, 451 (1957), holds that LMRA Sec. 301 authorizes "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . ."

persuasive authority,[12] in this instance they are too inconclusive to be helpful. A good many decisions would permit an individual to maintain a suit for violation of a collective agreement, but the issue was usually raised by the employer's contention that the collective agreement created no legal rights and the opinions do not consider the possibility of a conflict between the individual and the union.[13]

In the states of California, Pennsylvania and Rhode Island, courts have held that a discharged employee has no redress in court if his statutory representative decides not to carry his grievance to arbitration,[14] but under the Railway Labor Act the Supreme Court held, five to four, that the representative cannot make a binding settlement of an individual's grievance unless he grants the authority by words or conduct creating a consensual agency.[15]

III

Analyzing the theoretical nature of a collective bargaining agreement sheds little light upon the basic problem. Familiar legal concepts are available to describe each of the three possible distributions of power among employer, employees and union. Legal techniques are available to implement them. But logic alone will not enable us to choose among the alternatives.

One early view was that although a collective bargaining agreement gave no rights to individual workers, whenever a man went to work his individual contract presumably incorporated the union agreement as a local custom or usage so that every failure to pay wages in accordance with the collective agreement was a breach of the individual contract of employment.[16] Of course, the parties to an ordinary commercial contract may stipulate that their agreement does

[12] 353 U. S., at p. 457.

[13] For example, *Leahy v. Smith*, 29 LABOR CASES ¶ 69,600, 137 Cal. App. (2d) 884, 290 Pac. (2d) 679 (1955); *Owens v. Press Publishing Company*, 29 LABOR CASES ¶ 69,762, 20 N. J. 537, 120 Atl. (2d) 442 (1956); *Coyle v. Erie Railroad*, 142 N. J. Eq. 306, 59 Atl. (2d) 817, rev'd on other grounds, 1 N. J. 350, 63 Atl. (2d) 702 (1949). For a collection of cases, see annotation, 18 A. L. R. (2d) 352, 370 (1951). The overwhelming weight of authority holds that an employee may not sue until he has exhausted his recourse under the grievance procedure (Howlett, work cited at footnote 5).

In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 27 LABOR CASES ¶ 69,063, 348 U. S. 437 (1955), the Supreme Court held that the federal district court has no jurisdiction, under Labor Management Relations Act Sec. 301, over an action brought by a union as bargaining representative to compel the payment of wages alleged to be due individual employees under the collective agreement. The decision gives superficial support to the view that employees have an interest in such claims superior to the interests of the union. Careful examination of the opinions shows that the ruling is upon federal jurisdiction and five Justices thought that the union ought to be allowed to sue as a matter of contract law. Furthermore, the *Lincoln Mills* case, cited at footnote 11, suggests that the *Westinghouse* case will not be followed hereafter.

Alabama Power Company v. Haygood, 32 LABOR CASES ¶ 70,693, 95 So. (2d) 98 (Ala., 1957), is a square holding that an employee has standing to sue for a wrongful discharge if the union fails or refuses to prosecute his grievance. Apparently there was no allegation that the union was guilty of fraud or misconduct. *Pattenge v. Wagner Iron Works*, 32 LABOR CASES ¶ 70,626, 275 Wis. 495, 82 N. W. (2d) 172 (1957), declares the right of the individual to sue despite the opposition of the union, but the evidence showed that the plaintiffs were CIO sympathizers in revolt against a rival AFL union which was the bargaining representative. The court said: "We do not construe the contract or the law as requiring an individual employee to invoke this grievance procedure to assert an accrued pecuniary claim in circumstances where it is reasonably apparent that the union is hostile to him and will not give him adequate representation."

In *In re Norwalk Tire & Rubber Company*, 23 LABOR CASES ¶ 67,550, 100 F. Supp. 706 (DC Conn., 1951), the court expressed reluctance to find in the collective contract an intention to make the union's action decisive, but he based his decision on the ground that the grievance procedure did not purport to make the union's position binding upon the employees.

[14] *Terrell v. Local Lodge 758, International Association of Machinists*, 32 LABOR CASES ¶ 70,686, 309 Pac. (2d) 130 (1957); *Garner v. KMTR Radio Corporation*, 31 LABOR CASES ¶ 70,368 (Cal. Dist. Ct. of App., 1956); *Chacko v. Pittsburg Steel Company*, (Pa. Ct. of Com. Pleas, 1957); *Disanti v. United Glass and Ceramic Workers*, 27 LABOR CASES ¶ 69,044 (Pa. Ct. of Com. Pleas, 1957); *Mello v. United Steel Workers*, 82 R. I. 60, 105 Atl. (2d) 806 (1954); see also *Taschenberger v. Celanese Corporation*, 26 LABOR CASES ¶ 68,585 (Md. Cir. Ct., 1954); *Norman v. Hathaway Bakeries, Inc.*, 23 LABOR CASES ¶ 67,745, 330 Mass. 352, 113 N. E. (2d) 450 (1953) (semble). Contra: *Alabama Power Company v. Haygood*, cited at footnote 13; *Eversole v. La Combe*, 18 LABOR CASES ¶ 65,989, 125 Mont. 87, 231 Pac. (2d) 945 (1951). These decisions are also supported by *dicta* in cases denying the employees the right to compel arbitration (for example, *U. S. v. Voges*, 26 LABOR CASES ¶ 68,638, 124 F. Supp. 543 (DC N. Y., 1954); *Bianculli v. Brooklyn Union Gas Company*, 22 LABOR CASES ¶ 67,135, 115 N. Y. S. (2d) 715 (N. Y. S. Ct., 1952).

[15] *Elgin, Joliet & Eastern Railway v. Burley*, 9 LABOR CASES ¶ 51,212, 325 U. S. 711 (1945), aff'd on reh'g, 10 LABOR CASES ¶ 51,227, 327 U. S. 661 (1946). Since the Railway Labor Act establishes a special statutory procedure for adjusting grievances and gives specific procedural rights to individual employees, the case is not a binding precedent outside the railroad industry.

[16] For example, *Hudson v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 152 Ky. 71, 154 S. W. 47 (1913).

not include local usages whereas the Railway Labor and Wagner Acts make the collective agreement controlling without regard to individual waivers.[17] The difficulty was surmounted by saying that the collective agreement is included in each individual's contract of employment by force of law somewhat as is a carrier's tariff or the statutory provisions of an insurance policy.[18] Under this view, which was adopted by the United States Court of Appeals for the Third Circuit[19] and followed by Mr. Justice Reed in the *Westinghouse* case,[20] the legal relation between the employer, the union and the employees is conceived as two bilateral contracts. One contract—between the employer and the union—is made up partly of promises running to the benefit of the union as an organization, like the checkoff or closed-shop clauses which the union alone can enforce[21] and partly of provisions relating to wages, hours and job security which the employer promises to incorporate in a second bilateral contract—the contract of hire between the employer and individual employees. The union may sue for breach of the first contract but, since it is not a party to the second contract, only the individual may sue for its breach. Since the claim for compensation is the individual's, it must follow that the union has no power to make a binding settlement.

There is no obvious logical fallacy in the analysis. Surely the parties could make such an arrangement if they wished.

A second theory holds that a collective bargaining agreement is a third-party contract with the employer as promiser, the union as promisee, and the employees as third-party beneficiaries.[22] In the *Westinghouse* case, Circuit Judge Staley argued that this description does not fit the facts because such promises as the union shop and checkoff do not benefit individual workers, but surely some of the promises in an instrument may run to the benefit of third parties while others benefit the promisee alone. (Judge Staley made just this distinction when he said that the wage clauses of a collective agreement are incorporated in the bilateral contracts of employment whereas the union shop and checkoff are omitted.)[23] The other objection to the third-party-beneficiary theory—that the individual's labor is the sole consideration for the obligation to pay wages—is hardly an accurate description of the facts. In negotiating a collective agreement, the employer promises a given wage scale as part of a package deal, in return for various undertakings by the union including the promise not to strike; it is rather unlikely that he would have agreed to the same wage scale without the union's promises. The individual's furnishing labor is a condition precedent to payment. In a practical sense, therefore, it is consideration—but not the only consideration—for the employer's promise to pay. Perhaps the individual who furnishes so much of the consideration ought to have an exclusive right to prosecute or compromise the claim, but if we reach this conclusion, it must be on grounds of fairness and policy rather than logical analysis.

Under the third-party-beneficiary theory, either the union or the employee may sue for breach of the promises inuring to the benefit of individual workers.[24] When the individual sues, judgment may be entered for the amount due him. When the union sues, the decree may be for specific performance or the company can be required to pay the money into the registry of court for distribution to individual workers in supplementary proceedings.[25] In a suit by either an individual or the union alone, the judgment would not bind the absent party, but the employer can protect himself against a second suit by impleading the absent party.

According to the third view, the legal situation under a collective bargaining agreement may be somewhat loosely compared to a trust, with a chose in action as the *res*. In this view, the bargaining representative, which is subject to fiduciary obligations,[26] holds the employer's promises in trust for the benefit of the individuals. The trust is a common legal device for handling situations in which a single ob-

[17] *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, cited at footnote 3.

[18] Case cited at footnote 2, at pp. 334-335.

[19] *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 24 LABOR CASES ¶ 68,108, 210 F. (2d) 623 (CA-3, 1954).

[20] Cited at footnote 13, at p. 464.

[21] *Mackay v. Loew's, Inc.*, 18 LABOR CASES ¶ 65,770, 182 F. (2d) 170 (CA-9, 1950), cert. den., 340 U. S. 828 (1950); *Volquardsen v. Southern Amusement Company*, 156 So. 678 (La. Ct. of App., 1934).

[22] For example, *Leahy v. Smith*, cited at footnote 13.

[23] Cited at footnote 19, at p. 628.

[24] *Heins v. Byers*, 174 Minn. 350, 219 N. W. 287 (1928) (creditor beneficiary); *Croker v. New York Trust Company*, 245 N. Y. 17, 156 N. E. 81 (1927) (donee beneficiary); Restatement, Contracts, Secs. 135, 345 (1932).

[25] See cases cited at footnote 24.

[26] Corbin, *Contracts* (1951), Sec. 1088, at p. 407.

ligee is empowered to play a continuing role in the administration of contracts intended for the benefit of a large and ever-changing group of beneficiaries who may have divergent interests. Massachusetts business trusts and mortgage indentures furnish familiar illustrations. According to this analogy, the union would ordinarily be the only proper party to bring an action for breach of the collective agreement and the judgment would bind the individuals.[27] The union can enter into binding settlements with the employer.[28] The individual's remedy is to show that the union's handling of the claim did not meet its fiduciary obligations.[29] In the latter case, the individual could sue the union to compel it to perform its duties or he could join the union and the company as codefendants and seek a judgment for the money alleged to be due him.[30]

In the absence of a clear-cut legal theory, we are brought back to the question: How *should* the law distribute the power to prosecute and settle grievances? Do considerations of policy and our sense of fairness dictate giving the employees discharged for pleading the Fifth Amendment a chance to argue to a court that their discharge violated the collective-bargaining agreement or do those considerations require us to say that arbitration clause plus the Steelworkers' decision not to press the grievance bars individual suits? In *Johnson's* case, would we come closer to our ideals by vesting the power to compromise and sue in the individual alone or exclusively in the union? Or is the right answer to allow either to sue but to make a settlement dependent upon the assent of everyone affected?

IV

There are three strong arguments for denying unions the power to settle grievances without the individual's assent and for allowing individual suits for breach of a collective agreement:

(1) The individual worker has a personal and vested interest in a claim to compensation or damages. *He himself* did the work. The money is due *him*. In a layoff or discharge it is *his* job that is at stake and *his* income. Why should the union be allowed to dispose of this uniquely personal right of the individual worker?

(2) The day-to-day handling of grievances probably presents greater temptation to play favorites than does the negotiation of collective agreements. In negotiating general rules to apply in the future, the incidence upon individuals is hard to foresee and, although various groups may be accorded different treatment, every group is likely to have some members who antagonized, and others who endeared themselves to, union officials. This characteristic of general law-making guards individuals against personal discrimination. Grievances directly involve only one or two individuals. Loyal unionists may have their claims pressed rapidly to a successful conclusion while workers who have not joined the union or who opposed the business agent in the last election find it harder to obtain a favorable adjustment.

(3) Still more troublesome is the trading-off of grievances. Suppose that A and B have separate grievances. The company may feel that A's claim is pretty strong while B's case is weaker. If the union makes the same appraisal, there may be an over-all settlement in which the union agrees to drop B's case in exchange for a favorable settlement of A's grievance. But is it fair to B that his chance of winning should be sacrificed in order that A's claim may be paid without risking the vagaries of an arbitrator's decision? Even if this kind of trading must be tolerated as part of the grease that makes collective bargaining work, there is danger that extraneous political considerations will influence the process. Might not both the company and the union officials be glad to trade off Johnson's doubtful but heavy claim for premium pay against a favorable settlement on a slightly smaller claim inuring to the advantage of a large number of workers?

Let us now turn the coin over. Although a substantial proportion of the grievances filed in any bargaining unit may affect no one other than the immediate grievant, many grievances cannot be adjusted without making a rule for the future which will have important consequences for other employees, some of whom may have interests quite inconsistent with the grievant's wishes.

[27] Restatement, Trusts, Secs. 280-282 (1935); Scott, *Trusts*, Vol. 2, Secs. 280-282 (1939).

[28] Restatement, Judgments, Sec. 85 (1942).

[29] Restatement, Trusts, Secs. 192, 322 (1935); Scott, *Trusts*, Vol. 2, Sec. 192 (1939), and Vol. 3, Sec. 322.

[30] Cases dealing with the remedy for breach of the duty of fair representation are collected in Cox, "The Duty of Fair Representation," 2 *Villanova Law Review* 151, 175-177 (1957).

Some grievances result from failure to foresee a problem at the time of contract negotiations. When the contingency arises and conflicting views are asserted, the issue is nominally framed by the past but the truly important question may be: "What rule shall hereafter govern our conduct in these circumstances?" The group may be affected by the future implications affecting the group. Nor can adjudication of past rights be separated from rule-making for the future. Both pertain to the interstices of the contract. The parties—and, when they fail, an arbitrator—can successfully project general standards upon specific occasions because they are required to make their determination within a given framework. The process works precisely because the same decision must be both an adjudication of the past and a rule for the future. To separate the two would either take the rule-making function out of the framework of the contract or else produce the unacceptable incongruity of two interpretations upon the same set of facts.

The point is illustrated by my example involving a claim for premium and overtime pay for high work on a holiday. Johnson's "simple, personal contract claim" might have affected other workers in at least three ways: (1) The employer might be outraged by a grievance demanding $112 for one day's labor, and the union might well feel—as it did in the actual case—that to permit its prosecution would be an instance of sharp dealing based upon an unforeseen application of the literal words of the contract which could only exacerbate labor-management relations. (2) For Johnson to press the full claim might lead to a ruling against any pyramiding of premium payments, thus creating a precedent damaging to other employees in the future. (3) There are several possible compromises which would have different consequences for different groups of workers. A compromise which gave Johnson double time for the high work and allowed one additional premium but which made holiday, overtime and out-of-normal hours premiums mutually exclusive would offer potential benefits to painters, carpenters, and other maintenance workers who might work high off the ground, but it would disadvantage the production workers who never work up high but who might get overtime work on a holiday. The production workers would gain, on the other hand, by a compromise which required pyramiding holiday and overtime pay but allowed no premium for high work when an employee was already receiving double time for another reason.

Many grievances affect large numbers of employees through the force of comparison. Jobs are rated in relation to other jobs in the same plant. Under the National Metal Trades Association plan, for example, one could hardly rate the hazards factor in the job of painters without affecting the rating of riggers and millwrights who do the same amounts of high work as the painters. Similar interrelations are involved in establishing rates of pay or work loads for new operations and in slotting individual jobs into an established classification system. In all such cases the decision to press or withhold a grievance, the way it is presented, and any negotiated adjustment may seriously affect large numbers of employees.

There are at least four ways in which the untrammeled individual enforcement of collective bargaining agreements might hamper the growth of sound labor-management relations:

(1) A prime function of a grievance procedure is to secure coherence and uniformity in interpreting the contract and building up a "law of the plant" for omitted cases. Most contracts give the union control of the grievance procedure above the first step. The arbitration clause is confined to disputes between the company and the union or to cases in which the union is dissatisfied with the last step. Consequently, it is usually held that an individual employee has no standing to compel arbitration.[81] To permit individual suits for breach of contract would invite divergent rulings. In Mr. Justice Frankfurter's words:

[81] *U. S. v. Voges*, cited at footnote 14; *Cox v. R. H. Macy & Company*, 30 LABOR CASES ¶ 69,869, 152 N. Y. Supp. (2d) 858 (N. Y. S. Ct., 1956); *Spilkewitz v. Pepper*, 31 LABOR CASES ¶ 70,462, 159 N. Y. Supp. (2d) 53 (N. Y. S. Ct., 1957); *Bianculli v. Brooklyn Union Gas Company* (N. Y. S. Ct., 1952); *In re Sholgen*, 22 LABOR CASES ¶ 67,168 (N. Y. S. Ct., 1952); *Kaufman v. Local 64, International Fur Workers Union, CIO*, 14 LABOR CASES ¶ 64,376, (N. Y. S. Ct., 1948); *Petition of Minasian*, 14 N. Y. Supp. (2d) 818 (N. Y. S. Ct., 1939); *Floyd v. WERB* (Wis. Cir. Ct., 1943). Contra: *In the Matter of Julius Wile Sons & Company*, 19 LABOR CASES ¶ 66,213, 199 Misc. 654, 102 N. Y. Supp. (2d) 862 (N. Y. S. Ct., 1951), where the court granted a stay pending arbitration and indicated that it would compel the employer to arbitrate even though the union was unwilling to act. For discussion of the right of individuals to intervene in an abritration proceeding commenced by the union, see 66 *Yale Law Journal* 946 (1957).

"To allow every individual worker to base individual claims on his private notions of the scope and meaning of a collective agreement intended to lay down uniform standards for all those covered by the collective agreement, is to permit juries and courts to make varying findings and give varying constructions to an agreement inevitably couched in words or phrases reflecting the habits, usage and understanding of the . . . industry."[32]

Possibly, the answer is to give employees a right to press their own cases even if the union wishes to abandon or compromise the claim, but to require them to follow the contract procedure, including arbitration instead of institution of a lawsuit.[33] To accomplish this result many contracts would have to be rewritten and, even then, practical difficulties might arise. Would employers and unions be willing to open their arbitration machinery to individual claimants? What would be done with cases now heard by a tripartite board? Contrary to the earlier rule, the National Railroad Adjustment Board now permits individuals to file cases, but I am told that no individual employee has ever obtained a favorable decision. Who would pay the cost of cases prosecuted by individuals? What would become of the elaborate screening machinery set up by the United Automobile Workers and General Motors to reduce the number of cases carried to arbitration?

Possibly, these obstacles could be hurdled, but there is a more fundamental objection: Allowing an individual to carry a claim to arbitration whenever he is dissatisfied with the adjustment worked out by the company and the union treats issues which arise in the administration of a contract as if there were always a "right" interpretation to be divined from the instrument. It discourages the kind of day-to-day cooperation between company and union which is normally the mark of sound industrial relations—a relationship in which grievances are treated as problems to be solved and contract clauses are only guideposts in a dynamic human relationship. When the interests of several groups conflict or future needs run contrary to present desires or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice and emotion. Limits must be placed on the authority of the group but within the zone of fairness and rationality this method of self-government probably works better than the edicts of any outside arbiter.

(2) To allow the individual to press his own claim either in court or before an arbitrator would create "a potential source of competition and discrimination that could be destructive of the entire structure of labor relations in the plant." Suppose that A and B are both inspectors whose job rating depends partly upon whether they work under "close," "average" or "little" supervision. If the bargaining representative handled A's case, and she was given a job classification based upon a finding that she required "average" supervision and then B handled her own case and obtained a higher rating based upon a finding of "little" supervision, would there not be loud cries that when the union represents you, you get a raw deal? Dissident groups, who might belong to rival unions, would be given the opportunity "to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement of even the most trivial grievance as a vehicle to build up their own prestige."[34]

(3) The danger of rivalry and discrimination would tend to discourage union officials from adjusting grievances in the lower steps of the procedure. Suppose that a business agent refused to press a grievance which he thought was unjust and then the employee had carried the case to court and secured a favorable decision. Would the business agent say "no" to the next frivolous claim? Public officials and arbitrators no less then employers constantly

[32] *Elgin, Joliet & Eastern Railway v. Burley*, cited at footnote 15, at pp. 749, 758 (dissenting opinion).

[33] In *Hughes Tool Company*, cited at footnote 9, at pp. 982-983 (1944), modified and enf'd, 56 NLRB 981 (1944), the Board said:

"We interpret the proviso . . . to mean that individual employees and groups of employees are permitted 'to present grievances to their employer' by appearing . . . at every stage of the grievance procedure . . . . If, at any level of the established grievance procedure, there is an agreement between the employer, the exclusive representative and the individual or group, disposition of the grievance is thereby achieved. Failing agreement of all three parties, any dissatisfied party may carry the grievance through subsequent machinery until the established grievance procedure is exhausted."

[34] *Douglas Aircraft Company*, A National Labor Board order (1945).

remind union officials that they have a duty to discountenance disruptive and frivolous claims. Before they can be expected to accept this responsibility, the union officials should be given the power to make their decisions effective.

(4) Permitting the individual prosecution of personal claims would require the law to draw a tenuous line between the contract rights belonging to individual employees and the rights enforceable by the union. Obviously, the union shop, the checkoff, and other promises benefiting the union as an organization are enforceable by the union. Commitments which benefit the generality of employees or sizable groups—such as a prohibition against changing shift schedules—probably belong in the same category because no individual worker has an identifiable interest in their performance. But how should we classify such obligations as a prohibition against foremen working with their hands or a restriction upon subcontracting? Unless layoffs result from the alleged violation, the union must control the interpretation and enforcement of these provisions. Should it be denied the power whenever an employee can show that he suffered personal damage? If not, where is the line to be drawn between these cases and claims to seniority rights or higher compensation?

Of course, one should be skeptical of the familiar lawyer's argument about the difficulty of drawing a line. Courts have drawn them successfully for a good many centuries. In administering a collective bargaining agreement, however, the parties cannot wait until after the event to be told whether the individual or the union had power to handle the grievance. Unless the parties are simply to disregard the law, the courts must formulate an approach which makes it possible for management and union to know *in the plant in advance* whether the individual or the union can make a binding settlement. While differences would be tolerated from company to company and even from plant to plant, there is value in having a uniform procedure for handling all claims of contract violations within a single establishment.

To summarize: Individual suits for the enforcement of collective bargaining agreements furnish the surest legal protection against the danger that selfish, arbitrary or careless union officials will mishandle claims inuring to the benefit of individuals and arising from their labor. However, this measure of protection can be bought only at the cost, first, of giving the individual power to press claims inconsistent with the interests of other workers and, second, of risking serious impairment of the operation of the contract grievance procedure.

V

Conceivably, the law might strike a balance between the gains and the costs and then lay down fixed rules applicable to all collective bargaining agreements. This would be the proper course if the weight of the argument lay heavily on one side or the other. Where the issue is so close, it would seem better to permit the balance to be struck in private negotiations between the company and the union, with the employees left to make their weight felt through the constitutional processes of the union. In this view, the relative rights of the union and the individual under a collective bargaining agreement depend initially upon questions of contract interpretation. If the employer and the union negotiate a contract which stipulates that the employees shall be compensated in accordance with its provisions, but only as they may be construed and applied by agreement between the company and the union and—failing agreement—by arbitration, the employees would have no substantive individual rights for enforcement. On the other hand, if the collective contract simply sets forth a wage scale and working conditions without establishing machinery for their administration, one might permit individual suits upon the theory that the promises were intended to run to the benefit of the employees without the intervention of the union.

Although negotiators rarely write such explicit language, one could usually find reliable guides to their intent by pursuing five lines of inquiry:

(1) Does the contract call for channeling all grievances and other disputes concerning its interpretation or application into a single grievance procedure? If the union is charged with handling grievances above the first step and if the union decides what cases to appeal and is alone given the right to invoke arbitration this is the equivalent of stipulating that the employees shall be paid in accordance with the contract as it is interpreted and applied through the grievance procedure. Such a contract contemplates the creation of rights which the union is to enforce for the benefit of the employees in the manner of one who holds legal title to a contract claim in trust for the ultimate beneficiaries. In such a case,

the courts should rule that the union has full power to sue and to make reasonable binding settlements.

(2) Are there many clauses in the contract which require implementation by the company and the union jointly or by the company alone subject to the union's right to challenge its decision? An affirmative answer would point strongly to an intention to create interests legally controlled by the union.

(3) Are there many clauses in the contract whose enforcement must be vested in the union because of the absence of injury to any identifiable employee?

(4) Is continuous law-making likely to be required in the guise of interpretation because of the wide scope of the collective agreement and the generality of its terms?

(5) How often will contested claims of contract violation give rise to competing interests among different groups of employees within the bargaining unit which can best be resolved through the use of the union's constitutional processes?

Such inquiries will usually lead to the conclusion that collective bargaining agreements in large-scale industries look to administration by the union as the representative of all the employees, whereas the simpler agreements merely establishing scales of wages and hours without a grievance procedure might well be held to contemplate a series of bilateral contracts, under which the right to sue for accrued compensation would vest in the individual worker and he alone could waive his claim.

In some cases, examination of the collective agreement may hardly intimate whether the parties intended to give the union an active part in administering the contract or to confer vested rights upon individual employees. When this occurs, the court must supply the parties with a fictitious intention based upon its own conception of sound industrial relations. In my opinion the presumption should be against individual enforcement of a collective bargaining agreement unless the union has unfairly refused to act or has abused its statutory power by entering into an unfair settlement. I base the conclusion partly upon an evaluation of the factors already mentioned, but also upon two other considerations.

(1) The individual employee can be granted a measure of protection against the improper handling of grievances by elaborating the duty of fair representation. In *Steele v. Louisville & Nashville Railroad*,[35] Chief Justice Stone held that the statutory bargaining representative has the duty "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[36] The case arose under the Railway Labor Act and involved racial discrimination, but the later decisions make it plain, first, that the NLRA imposes a similar obligation[37] and, second, that the duty is violated by other forms of unfairness.[38] The principle seems equally applicable to grievances, as the Fifth Circuit noted in the *Hughes Tool* case.[39]

The bargaining representative would be guilty of a breach of duty if it refused to press a justifiable grievance either because of laziness, prejudice or unwillingness to expend money on behalf of employees who were not members of the union. Individual enforcement would then become appropriate. The proper remedy would be an action against the union and employer analogous to the action maintainable by the beneficiary against the debtor of a trust when the trustee refuses to bring the action.[40] It would be a defense to show that

[35] Cited at footnote 4.

[36] 323 U. S., at p. 203.

[37] *Syres v. Oil Workers Union*, 29 LABOR CASES ¶ 69,550, 350 U. S. 892, rev'g *per curiam*, 28 LABOR CASES ¶ 69,303, 223 F. (2d) 739 (CA-5, 1955); *Wallace Corporation v. NLRB*, 9 LABOR CASES ¶ 51,187, 323 U. S. 248, 255-256 (1944).

[38] See *Ford Motor Company v. Huffman*, 23 LABOR CASES ¶ 67,505, 345 U. S. 330, 336-338 (1953); *Trailmobile Company v. Whirls*, 12 LABOR CASES ¶ 51,247, 331 U. S. 40, 67-70 (1947) (dissenting opinion); cf. *Crowell v. Palmer*, 14 LABOR CASES ¶ 64,498, 134 Conn. 502, 508-509, 58 Atl. (2d) 729, 732 (1948).

[39] *Hughes Tool Company v. NLRB*, 9 LABOR CASES ¶ 62,503, 147 F. (2d) 69, 74 (CCA-5, 1945).

[40] Restatement, Trusts, Sec. 282. This appears to be the net effect of most of the decisions. Nearly all the courts in which the issue has been raised have held that both the bargaining representative's decision not to press an individual's grievance and also a settlement between the representative and the employer preclude an individual action in the absence of fraud or caprice. In addition to the cases cited in footnotes 14 and 15, see *Zdero v. Briggs Manufacturing Company*, 24 LABOR CASES ¶ 68,050, 338 Mich. 549, 61 N. W. (2d) 615 (1953), where the court dismissed a bill brought against both employer and union complaining of an alleged denial of seniority rights, saying: "There is a complete absence of any testimony indicating that the defendants, Local Unions Nos. 212 and 272, acted in bad faith or in an arbitrary or negligent manner." In allowing individuals to sue in *Pattenge v. Wagner Iron Works*, cited at footnote 13, the court noted that the record made it apparent that the union was hostile to the plaintiffs and would not give them adequate representation.

the union and employer had made a settlement or that the union's decision not to press the claim was honest and reasonable.[41]

An employee should also be permitted to bring an individual suit against the union and the employer to challenge any grievance adjustment resulting from breach of the duty of fair representation. The theory of the action would be the same in principle as an employee's suit to challenge a collective contract involving racial discrimination or some other fundamental unfairness.[42] Depending on the circumstances of the particular case the remedy might be an award of damages against the company or the union,[43] or even a decree requiring the union to prosecute the plaintiff's claim in arbitration.

In evaluating the protection available through enforcement of the duty of fair representation, one must recognize that there are no ready-made standards of fairness. Plainly, the duty is violated whenever the union's handling of a grievance is influenced by union memberships or activities, union politics, the exercise of political rights, or sheer favoritism. Starting from these points of reference, the creativeness of the law seems adequate to evolve the necessary standards.[44]

In practice, the value of the theoretical right to fair representation must be heavily discounted because only small sums are likely to be involved, because this branch of labor law is full of uncertainty and because individual workers often have difficulty in obtaining skilled and imaginative legal services. Without meaning to minimize these very serious difficulties, however, I doubt whether the obstacles are any greater than those which would confront the individual employees if they were legally free to prosecute suits directly against the employer. These practical difficulties bring me to the second consideration.

(2) Is not the truth of the matter that society can never put its main reliance on individual suits as a method of protecting individuals and minorities against unfairness in the administration of collective bargaining agreements whether the suit be brought against the company to enforce the collective bargaining agreement or against the union for failing to give fair representation? The employees' best safeguard is an active, responsible bargaining representative. If the union fails to handle a grievance fairly, it will be a rare case in which an employee gets satisfaction through legal proceedings. Thus, the ultimate problem is not so much a matter of legal techniques as of men, and of their ideals and sense of duty. The law can influence their attitudes. If the legal doctrine were that any employee has a right to press his own grievance and bring an individual suit for breach of contract, union officials could hardly be criticized for excusing their failure to press a just claim by saying that the employee had a right to press the grievances himself if he wished. Conversely, union officials would be more sensitive to the interests of individuals if the law gave them exclusive power to handle all claims for breach of contract subject to the concomitant legal and moral obligation to handle them fairly on behalf of every employee in the bargaining unit.

The proper role of individual suits is to enforce the fiduciary duty. The challenge facing the law is to develop standards which will give relief against abuse without unduly restricting freedom of negotiation.

[The End]

NEW YORK'S OUTMODED LABOR LAW

Before the Joint Legislative Committee on Industrial and Labor Conditions, David L. Benetar said: "A decision of the . . . Supreme Court . . . this year highlights the price New York is paying for its out-of-date labor statute. Because of that statute, New York has been ousted by federal law from the right to regulate the industrial relations of hundreds of employers and thousands of employees within its borders.

". . . the New York State law, as it stands today, is . . . deficient. It contains no machinery for disposing of suits arising out of rivalry between unions over particular work assignments. It provides no adequate protection against the closed union and the closed shop. It provides no guaranty of free speech. . . . It permits, if it does not encourage, use by the hoodlum in union official's clothing of the most effective economic weapon and threat, namely, picketing by strangers to coerce a contract."

Mr. Benetar is a partner of Nordlinger, Riegelman, Benetar, and Charney.

[41] See authorities cited in footnotes 14 and 15.
[42] Cf. *Steele v. Louisville & Nashville Railroad*, cited at footnote 4.
[43] See footnote 30.
[44] Cox, work cited at footnote 30, at pp. 159-169.

Statutory and Fiduciary Standards and the Administration of Property

By PAUL W. WILLIAMS

The author is United States Attorney for the Southern District of New York.

THE GOVERNMENT of the United States has a very keen interest in the matters being discussed at this conference, which has been convened to consider some of the developments brought about by the tremendous growth in the size and power of labor unions. This is so because the policy of the federal government, as enunciated in the preamble of the National Labor Relations Act,[1] has been to encourage the expansion of unions. I think it safe to say that, without the provisions of the act, the tremendous advances in the standard of living of our workers would never have been possible.

However, having fostered a program by which, today, many millions of Americans belong to some form of union, the government has a responsibility to guard lest this system which has brought so many benefits become an instrument of repression and corruption. The issue which confronts us today is not whether there shall be strong unions, but rather whether there shall be responsible unions. The right of workers to organize and demand collective bargaining is not seriously challenged in this day and age. These rights were not won without an initial struggle, and there are many employees whose memories bear scars which will not permit them to take for granted the benefits which their efforts have enabled younger workers to enjoy. Thus, some union leaders have viewed as a challenge to their hard-won gains any attempt by any person to examine or criticize various aspects of labor unions. The fear on the part of many political leaders that frank expression of their views might bring upon them the unequivocal label of "antiunion" has, to some extent, permitted labor unions to operate in a political sanctuary. Thus, acts which, if committed outside of the sanctuary, would have been condemned are often regarded merely as inevitable elements arising from the exercise of rights guaranteed by the Constitution of the United States and the laws of the land. This sanctuary has unfortunately attracted some who have used the cloak of respectability afforded them by a labor union designation for carrying on acts of extortion, violence and greed.

Various law-enforcement agencies, such as the office which I head, have dedicated themselves to the prosecution of those criminals against whom proof can be gathered; I will speak later on of some of the work of my office. I believe that the Senate Committee on Improper Activities in the Labor or Management Field has performed a valuable service to the nation. The hearings have shown that labor's worst enemies are not outside, but actually inside, the labor organization. Able and enlightened leaders, such as President Meany of the AFL-CIO, appear to have recognized this threat, and I sincerely hope that they will continue to cooperate with those of us who are applying the power of the government in dealing with corruption wherever found.

I do not mean to suggest that only in unions are there men who betray the trust placed in them. It was the examples of dishonesty and deception shown by some financial advisers and businessmen that stirred the Congress to establish the Securities and Exchange Commission to protect investors. Laws, both state and federal, which require disclosure and penalize transactions such as insider trading have done much to improve the financial atmosphere of the country by removing the temptations to which the weak of character might succumb.

[1] 29 USC Sec. 141.

When wrongdoing takes place in labor matters, labor must realize that we in the government are attacking the wrongdoing and not the union and that it is not anti-union for us to do so. The bipartisan work of the Senate committee, and the fine co-operation which some union leaders have accorded to it, is a real demonstration of the kind of constructive attitude which is needed today.

With these thoughts in mind, I want to discuss with you some of the problems which have arisen as a result of the welfare and pension funds which have mushroomed since World War II, and my ideas for dealing with them.

It is important that this subject be considered with sympathetic thoughtfulness, for it would be unfortunate indeed if some of the scandals which have been exposed in connection with these programs should undermine the spirit of cooperation and intiative which made the creation of these plans possible. The very existence of these welfare and pension plans is evidence of a continuing American search to devise new and effective means of combating the old economic problems of illness and enforced unemployment that have caused such severe hardship in the past.

Perhaps you will have a greater conception of the magnitude of these programs when you realize that 29 million workers and 46 million dependents—or nearly one half of this nation's population—are affected by them and that in 1954 alone $6,846,200,000 was paid into these programs.[2] It is small wonder, then, that the proper management of these programs and the tremendous amount of funds involved in them is becoming more and more the subject of critical and close scrutiny. But before discussing the administration of these plans, it may be helpful to consider briefly the specific purposes which they serve.

Welfare plans and pension plans are frequently lumped together, even though they perform different functions. Welfare plans provide for emergencies which may confront an employee at any time during his employment. Pension plans, on the other hand, provide benefits only in the future—and even then only if the employee has been employed for a prerequisite number of years. In the majority of instances, welfare plans are implemented by the purchase of group insurance policies and, although the vast majority of pension plans also look to insurance coverage, some of these plans are self-insured or trusteed plans.[3] A very limited number of plans are pay-as-you-go plans in which the employee puts all his reliance upon the good faith and continued solvency of his employer. By the use of these devices, various funds are converted into programs which provide innumerable benefits to the American workingman and his family.

Let us look now at the funds themselves—their sources and control.

There are, basically, four kinds of plans which are currently utilized today,[4] and they are used in managing both welfare and pension programs. The first is a type of fund created, maintained, administered and supervised solely by the employer, often without any contributions by the employee. The second plan involves a trust established by a single employer and a single union, and managed by trustees appointed by them. The employer makes his contributions into the trust. The third type of plan differs from the previous one only in that the fund is established by many employers jointly with a union which represents their employees and, once again, trustees are appointed by management and the union. The fourth involves a wholly union-administered plan in which contributions come solely from the employees. The vast majority of plans fall into the first, or employer-supervised, group; the third, or multiple employer-employee, group is next in size. The second and third plans are the types contemplated by Section 302 of the National Labor Relations Act which will be discussed further along.[5]

The tremendous growth of the assets of these plans and their novelty have unfortunately provided an open door for those few opportunists who thrive in an atmosphere of power unchecked by effective outside control. These funds have been compared to a conveyor belt upon which the employer and the union place the respective amounts for which they have committed themselves. There are considerable amounts of money moving along the con-

[2] S. Rept. 1734, 84th Cong., 2d Sess., pp. 11-12; final report of Subcommittee on Welfare and Pension Funds submitted to Committee on Labor and Public Welfare, hereinafter referred to as "final report."

[3] Senate interim report of Subcommittee on Welfare and Pension Funds submitted to Committee on Labor and Public Welfare, 84th Cong., 1st Sess., p. 8, hereafter referred to as "interim report."

[4] Final report, pp. 14-15.

[5] 29 USC Sec. 186 (Sec. 302).

veyor belt and there are many persons standing along the sides who are in an advantageous position to remove and divert some of this money before it gets into the hands of the workers who, after all, should be the ultimate beneficiaries.

Even where group insurance policies are purchased from reputable companies, there still remains the problem of making certain that the money intended to be used for paying premiums to the insurance company actually gets there. For example, the trustees of the social security department of the Laundry Workers International Union in March, 1951, selected an "insurance agent," and passed a resolution providing that all premiums earmarked for the insurance company concerned should be paid to this "insurance agent" for transmittal. Between that time and October, 1953, records revealed that over $900,000 of the $3 million designated for premiums had been diverted by the "insurance agent." [6]

Administrators' fees have been a source of abuse. To be sure, administrators should be compensated for the responsibilities assumed and for their clerical expenses, but there have been all too many instances in which individuals who have performed negligible services and assumed little responsibility have received far more than negligible compensation. The Senate subcommittee found an instance in which two union trustees were receiving from the plan, in addition to a specified salary, annuity contracts costing $9,000 per year. One of these union trustees was reported to be spending most of his time in Florida, and the committee, with considerable understatement, said: "The nature of the 'services' he performed could not be determined." [7]

Furthermore, in the selection of the insurance carrier there is ample room for personal profit, since most states require that a commission be paid to an insurance broker or agent.[8] Thus, the agent who can steer the pension programs of a particular corporation into the receptive arms of a particular insurance company can—and frequently does—dictate the extent of his compensation. The "insurance agent" for the Laundry Workers International Union, referred to before, had a life contract with an insurance company to receive a flat 10 per cent renewal commission on all group business produced. From April 1, 1950, to September 30, 1953, it appears that the said broker received commissions of $262,500. The committee estimated a normal commission to be $18,125 for the three years. This was, of course, in addition to the other funds which never even reached the insurance company.[9] I am not suggesting that commissions are wrongful, but the beneficiaries should have a right to expect that the recipient of their business shall be selected on the basis of the services which he will perform on their behalf and the competence with which he will perform his duties. The commission should not be a plum to be savored by some favorite individual.

Indeed, there have been shocking instances in which union officials, representatives of employers and even trustees themselves have profited by forwarding programs to certain insurance companies in return for favors. An insurance company on one occasion paid $85,000 to an acting secretary-treasurer of a union, over a period of two years, for expenses allegedly incurred by the union in promoting its welfare plan.[10]

You may ask how such apparent abuses can take place when funds are under the joint management of employer and union. One answer may be that, in the plans in which responsibility is divided, there is less incentive for either party to maintain close supervision, as neither party feels the burden of exclusive responsibility. These joint programs have generally arisen as a result of collective bargaining and, thus, it is often feared that an accusation by either party against the trustees of the other may have ill effects on the collective bargaining sessions which take place periodically. In all too many instances, management's trustees have tended to abdicate their duties on the theory that once the employer has made the payments agreed upon, their trustees have discharged their responsibilities, as trustees, toward the workers. The subcommittee found that one employer had attempted to circumvent the responsibility which was placed upon him by Section 302 of the National Labor Relations Act by arranging to have the employees provide him with a written assignment of a so-called "wage increase," pursuant to which sums were paid to a welfare plan controlled by the union.[11] Thus, the employer justified his

[6] Final report, p. 39.
[7] Interim report, p. 13.
[8] Hearings before the Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Works, 84th Cong., 1st Sess., Pt. 1, pp. 83-84 (1955).
[9] Final report, p. 30.
[10] Final report, p. 34.
[11] Interim report, p. 15.

Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law can not by any latitude of interpretation be a part of that public opinion which is a final source of government in a democratic state.

—Learned Hand

failure to appoint trustees to share administrative duties.

The employer-dominated plan is possibly less susceptible to abuses for the simple reason that under these plans the employer guarantees to provide certain vested benefits, and excessive administrative costs and brokerage fees are contrary to his own interest—to provide the benefits as inexpensively as possible. Stockholders are usually quick to note abuses, since dividends would be adversely affected. Nevertheless, the temptation to dip into such funds may in some cases be overwhelming; this remains a danger in the case of less reputable companies. For example, the Internal Revenue Service not infrequently encounters impecunious employers who have made use of withholding-tax funds.

In the case of funds handled exclusively by the union, the employees have just as vital an interest as the stockholders of a corporation, but the union officers sometimes lack the administrative skill required in managing a welfare program and the employees may, for various reasons, fail to make their influence felt. It is unfortunately true that there have been cases in which money contributed by union members specifically for welfare purposes has been commingled with other funds in the union treasury and diverted for illegal or capricious purposes. In one case, a union obtained control of a small insurance company, whose affairs they managed without adequate accounting and audits. The president of the union relaxed in luxurious resorts in various parts of the world and dispensed generous gifts to those in his favor.[12]

The United States Government has watched these developments with a growing sense of helplessness as federal statutes presently on the books are for the most part inapplicable and, where applicable, are ineffective. Section 302 of the National Labor Relations Act,[13] which is the major federal statute directly in point, reveals the inadequacy of the present federal program.

Section 302 prohibits payments by an employer to the representatives of his employees. An exception to this section, however, permits payments to certain types of welfare and pension funds provided that the funds are held in trust for the employees for pensions, medical care, employment benefits, and the like. Under the section, both labor and management appoint an equal number of persons to act as trustees for trusts created through collective bargaining. However, inasmuch as Section 302 deals only with jointly created and managed trust agreements, its scope automatically excludes, and is thus inapplicable to, welfare plans handled exclusively by either the employer or the union, which constitute the vast majority of all welfare plans. Furthermore, once a Section 302 trust is lawfully set up, no federal sanctions police its future activities or require its efficient operation.

Another federal statute which touches upon welfare and pension plans is the Internal Revenue Code.[14] The Code exempts from taxation voluntary employee beneficiary associations once they have qualified and as long as they file annual information returns.[15] The Internal Revenue Service, however, is necessarily concerned with the receipt of revenue and, therefore, the Code does not make unlawful those programs which do not qualify for continued favorable tax treatment nor can the inspection of these tax returns be more than cursory.

On the state level, it is encouraging to note that at least some states have recognized the problems outlined, to the extent of enacting legislation requiring administrators of these plans to submit reports to the state government.[16] The effectiveness of this legislation, of course, depends upon how detailed the reports are and how diligently they are examined by the state agency involved. Significant in my opinion are statutes now adopted by several states which authorize and empower certain state officers, such as the superintendent of insurance, to examine the books of any welfare and pension plan.[17]

New York State, in 1956, passed a comprehensive statute which amended its in-

[12] Final report, p. 23.
[13] 29 USC Secs. 141 and following.
[14] United States Code, Tit. 26.
[15] 26 USC Sec. 501(c)(9).
[16] Interim report, pp. 43-44.
[17] Interim report, pp. 43-44; New York Insurance Law, Sec. 37 (Supp., 1957); Washington Laws, Extra Sess., 1955, Ch. 8, p. 1745.

surance and banking law with respect to the registration, examination and supervision of employee welfare funds.[18] Registration of the fund is mandatory. The superintendent has the power to examine the funds at any time and is required to do so at least every five years. Annual reports must be filed with the superintendent, and collusion between agents and trustees as to the funds is prohibited by statute. The statute also makes provisions for enforcement. The superintendent may impose a penalty on a trustee or he may obtain an injunction in the name of the state against acts in violation of the statute. Furthermore, if the superintendent finds that funds have been mishandled, he may refer the matter to the attorney general, who may bring an action to recover amounts so mishandled.[19]

This action by the states suggests to my mind, however, that perhaps the principles applicable in the law of trusts have not been fully exploited and that perhaps these old principles can be extended by statute to meet the new problems raised by welfare and pension programs.

Under the law of trusts, which has evolved through the years, the courts of equity can be called upon to censure and surcharge those who violate their fiduciary responsibilities by exploiting funds entrusted to them or by utilizing their role to gain personal advantage. However, not all of the plans which I have mentioned are trusts. Some of them are derived from other relationships. For example, the employer-managed plans arise essentially from a contractual relationship in which the parties bargain for the receipt of certain vested benefits to be paid in the future and for which the company has agreed to be indebted. In some of the union-managed plans, the union agrees to make certain benefits available; frequently, no separate fund of money is set aside for investment. In both of these cases the employee has only a contractual right for which he may sue if he fails to receive what has been promised him.

In the jointly operated programs, however, trust principles have been held by the courts to be applicable.[20] Under the law of trusts a trustee may compel fellow-trustees to account and may seek the aid of an equity court in determining whether the terms of the trust are being violated. The beneficiaries likewise have the right to compel an accounting which would cause trustees to be surcharged for any amount of money lost through mismanagement or for any personal profit made possible by their fiduciary role.

It has been argued that an employee has no standing in a court of equity because he is only a potential beneficiary, who must remain in the employ of the company for a specified number of years. I believe that the law of trusts is not so severe, for there are cases in which beneficiaries, whose interests have been no more than contingent, have nevertheless been held to be entitled to seek an accounting,[21] and an employee would seem to have similar standing. Furthermore, while departure from the employ of the company usually brings to an end the employee's rights, under some plans his rights become vested after a certain number of years spent with the company, and subsequent employment elsewhere, prior to retirement age, does not divest him of his rights. Even where the beneficiaries are properly informed, only a few courageous employees will dare to risk the threat of union reprisal and this only where the abuses have been so flagrant as to be intolerable. Unfortunately, the malady so aptly described by United States District Judge Herlands as "under-world lockjaw" may cause honest workers to remain silent for fear of losing their jobs and endangering the safety of their families. The result of this is to present the anomalous situation of a trust virtually incapable of being enforced.

Obviously, there must be some way found by which an officer of the government can enforce the rights of the beneficiaries. I believe that the law of charitable trusts may provide the answer. Where the trust is a so-called charitable trust, the attorney general of the state may bring an action either on behalf of a beneficiary or on his own initiative. Charitable trusts, as distinguished from private trusts, are considered to affect the public interests since they pertain to persons in need of assistance and are less susceptible to private enforcement. Professor Scott has used the term "charitable" in describing various trusts established to assist persons who are or have been em-

[18] New York Laws, 1956, Ch. 774, passed April 18, 1956.

[19] New York Insurance Law, Sec. 37 (Supp., 1957); New York Banking Law, Secs. 60-75 (Supp., 1957).

[20] *United Garment Workers of America v. Jacob Reed's Sons*, 16 LABOR CASES ¶ 64.927, 83 F. Supp. 49 (DC Pa., 1949). *Upholsterers International Union v. Leathercroft Furniture Company*, 16 LABOR CASES ¶ 64.972, 82 F. Supp. 570 (DC Pa., 1949).

[21] Scott on Trusts (2d Ed., 1956), Sec. 172.

ployed by a particular business.[22] Furthermore, several courts have indicated that a pension-fund trust is indeed a charitable trust. For example, Judge Goldsborough in his dictum in *Van Horn v. Lewis et al.*,[23] declared that the welfare and retirement fund was a beneficial charitable trust and that all rules applicable to charitable trusts applied. On another occasion, a California court upheld the validity of a testamentary bequest to three specific railroad employee pension funds, which by statutory provisions would have been invalid.[24] However, by calling the fund a charitable trust, the court was easily able to uphold the bequest.

In the states where the status of the trust as charitable is in doubt, the legislatures should consider adoption of laws which would give the attorneys general of these states the right to treat all pension and welfare trusts as charitable trusts; the laws should require the attorney general or a superintendent of insurance to make periodic inspections to seek out possible abuses. In this way, employees who did not wish to take the initiative themselves could seek the aid of the state as a champion.

It seems to me that these trusts have so great a national significance that the Congress should consider legislation which would confer upon the United States Attorneys the authority to enforce trust relationships either on their own initiative or upon complaint by beneficiaries. Of course, such legislation would apply only to trusts for the benefit of employees whose activities come within the scope of federal jurisdiction. The purpose of such legislation would not be to extinguish the efforts of the attorneys general of the states, but rather to afford an additional sanction against corruption in states where the attorney general, for one reason or another, failed to take needed action. It might well be that in certain states the legislation would be more stringent, and the federal legislation should carefully provide that states are by no means to be excluded from acting side by side with the federal government in such matters.

The programs established through collective bargaining and managed solely by the employer raise a very troublesome problem, for the obligation to the employee is essentially contractual. Many corporations claim that the manner in which they provide the funds needed to finance the program of benefits is their own concern. Some employers set aside a certain sum for each employee and have a special program of investment. If the investment is unprofitable, however, the employer is still bound to provide the benefits contracted for. It is hard to see how trust principles can be applied here. Where the employer is a corporation with active stockholders, the stockholder suit is the most effective method. The employee, on the other hand, appears to have no way in which he can prevent waste and misuse of the funds set aside for him by the employer.

While the employer should be free to invest his own funds as his judgment may dictate, the extent of the investment risk he takes should be known to the employee. Admittedly, this would mean that the employer would have to disclose the nature of the investment made with the funds designated for employee benefits; many employers oppose this. Nevertheless, I do not see how the interests of the employee can be adequately protected unless he can obtain information which will enable him to determine whether his employer is wasting or misusing funds set aside for his benefit. This is especially true in instances where the employee contributes to a program of benefits.

It is my view that the employee could be protected by some requirement that regular annual reports of the administration of the fund be furnished by the employer to its employees. Perhaps this could be implemented by a standard provision to be made a part of all collective bargaining contracts much the same as standard clauses are required by state authority in insurance contracts.

Pension and welfare plans administered solely by the union raise equally troublesome problems. Here we are confronted with the issue of how a union is to be kept accountable to its members. Certainly, the investigations conducted by my office and by the Senate committee have demonstrated that there is inadequate supervision of union officials who bear the responsibility for taking care of funds. It seems to me that pension and welfare plans established and managed by unions should be treated as charitable trusts and that the United States Attorney should be given the same standing to compel an accounting that I have proposed with respect to the trusts established jointly by the employer and the union.

[22] Scott on Trusts (2d Ed., 1956), Sec. 375.2.
[23] 15 LABOR CASES ¶ 64,596, 79 F. Supp. 541, 545 (DC of D. of C., 1948).
[24] *Estate of William Tarrant*, 38 Cal. (2d) 42, 237 Pac. (2d) 505 (1951).

With respect to union treasury funds, as distinguished from pension and welfare funds, the Senate hearings have shown that some of the worst instances of personal profit have involved some union leaders who have seen no harm in borrowing union funds at little or no interest. Investigations have revealed instances in which labor leaders have received money from employers in return for favors and have used such capital to set up profitable personal businesses. While the government can obviously prosecute for extortion when the facts warrant, it would seem as though an even more effective weapon would be available against these abuses if a constructive trust were to be imposed upon profits obtained through transactions made possible by union rank and power. The statement of ethics adopted by many union internationals requires higher standards of fiduciary conduct on the part of union officials and, combined with an application of constructive trust principles, the new codes could perform a great service. I believe in giving the unions every opportunity to clean house themselves and that the government should take part only as a last resort. However, if this fails to bring results, it may be necessary to consider ways of enabling outside authorities to assist the unions in their efforts to curb such abuses.

As mentioned before, absence of specific information has been an important factor in making abuses possible. The very nature of the abuses which I have described indicates the scope of the information which needs to be made available.

The method of providing for disclosure will bear some discussion.

Section 9(f)[25] sets forth, as a condition precedent to the receipt of many of the benefits of the National Labor Relations Act by a union, that a financial statement be filed with the Secretary of Labor and be furnished to members of the union. According to recent cases, false statements willfully made would make the person signing the report subject to prosecution.[26] I believe that this section should be amended to require that all unions whose activities affect interstate commerce should comply with Section 9(f)(A) and (B) regardless of whether the union wishes to have the benefit of the National Labor Relations Act. Furthermore, the deliberate failure to file information or the deliberate filing of false information should be made a crime, with the penalty spelled out within the section.

Section 302[27] requires an annual audit of the trust funds mentioned previously and specifies that the results be available "for inspection by interested persons at the principal office of the trust fund . . . ." I believe that trustees of such trusts should be required to file these reports with the Secretary of Labor and that copies of the reports should be furnished to all potential beneficiaries. False statements or failure to file should be dealt with as in my proposal for Section 9. This would bring the two sections into a consistent relationship with each other. Such general descriptive phrases as "administration expenses," etc., would have to be broken down. Disclosure should bring into the open the names of recipients of money, whose services could be subjected to scrutiny. Trustees should be required to report any income or loan received from insurance companies or from any other sources associated with the duties which they perform.

Obviously, the Departments of Labor and Justice would have to work out together an effective policy of enforcement, since the Department of Labor would have possession of the information filed. Furthermore, the relation between federal and state activity would have to be examined, since the purpose of my proposal is to supplement, rather than extinguish, the constructive role now being taken by some states. Unnecessary duplication and unreasonable burdens upon unions should be avoided to every extent possible.

It should be hoped that the very necessity of filing reports with government agencies would impress upon fiduciaries and other officers the advisability of avoiding transactions which, if disclosed, would subject them to censure, if not prosecution.

At present, states' attorneys must bear the difficult task of prosecuting those who embezzle union or trust funds. I believe that embezzlement should be dealt with by local district attorneys wherever possible. However, I believe that the national scale upon which some unions operate makes it essential that there be a federal statute concerning such embezzlement, and that the United States Attorney should be enabled to prosecute embezzlements where the local officials

[25] 29 USC Sec. 159.

[26] *NLRB v. Eastern Massachusetts Street Railroad Company*, 30 LABOR CASES ¶ 70,417, 235 F. (2d) 700 (CCA-1, 1946).

[27] 29 USC Secs. 141 and following.

The law is the last result of human wisdom acting upon human experience for the benefit of the public.
—Sam Johnson

are ill-equipped or unwilling to prosecute. I believe that many district attorneys, who find their efforts thwarted by the interstate scope of some unions, would welcome the assistance of the Department of Justice in dealing with embezzlement from unions or from trust funds established for the benefit of employees.

The reason that I have put so much emphasis on the civil remedies, as distinguished from the criminal sanctions, is that so many of the shocking abuses which we have seen do not lend themselves to statutory prohibition. While embezzlement of funds is obviously a crime, the equally reprehensible practice of taking personal advantage of a fiduciary position is not. Legislation may not endow fiduciaries with genuine traits of selflessness but the fear of exposure can give rise to a self-interest upon the part of a fiduciary which will serve a similar function.

This program of disclosure, plus the grant of standing to government officials in both civil and criminal procedure, can help foster responsible unionism.

As the head of a law-enforcement agency which has been fighting against crime in labor unions for a considerable period of time, I would like to tell you something of the work of my office and outline some of the unique problems which face my staff.

The City of New York, like Chicago, is a great banking, cultural and manufacturing center, and we take pride in its eminence in these fields. Many of the manufacturing industries compressed into our metropolitan area are small businesses and, while the total volume of goods and services produced in this geographically cramped area is truly enormous, it is produced by these thousands of highly competitive establishments. The tradition of unionism is strong in the city, and its citizens are highly conscious of the beneficial results of legitimate unionization. On the other hand, we have a manufacturing system in which the difference between the saving of a few dollars in wages per week or a few cents per item in shipping costs may mean the difference between success and failure—the difference between being able to compete and the inability even to remain in business.

You can readily see how the unscrupulous find ample opportunities to infiltrate this system. Not only on the unions' side have hoodlums enlisted. For every racketeer union, there is a manufacturer who is willing to connive with it to exploit and, in some cases, physically oppress his employees.

For well over two years my office has been making a thorough and painstaking investigation of racketeering in unions in the New York area. Under our supervision, the Federal Bureau of Investigation has investigated the activities of a score of unions located in New York City. We have examined the books and records of literally hundreds of business organizations in the area in our attempt to break through the collusive veil which some business organizations and their partners, the racketeer locals, have thrown up. We have tried continuously to collect legal evidence to expose before the bar of justice the calloused operations which are practiced upon the workingmen of our city.

Our office was one of the first to obtain a conviction against a major union official—James Ryan of the Longshoremen's Union—for accepting bribes and gifts from employers, in violation of Section 302 of the Taft-Hartley Act. Since his conviction was affirmed by the Supreme Court of the United States in 1956, racketeers and others have begun to realize that we intend to use every law available to us.[28]

Such convictions and such indictments, however, are admittedly difficult to obtain. There is a considerable difference between knowing of such activities and being able to prove them. It is not easy to find an individual employee or businessman with the courage to come forward and testify against the strong-arm men, or to break through the ingeniously arranged books of businessmen who pay off the racketeer for their own advantage. I can assure you, however, that my office will not cease in its efforts to maintain the diligent probing and investigation which represents the only way in which this cancerous growth in the life of our social and economic system can be removed.

The diabolical blinding a year ago of Victor Riesel, who reported the news as he saw it, has shattered much of the com-

[28] *U. S. v. Ryan*, 27 LABOR CASES ¶ 68,937, 128 F. Supp. 128, (DC N. Y., 1955), rev'd, 28 LABOR CASES ¶ 69,341, 225 F. (2d) 417 (CA-2, 1955), rev'd, 29 LABOR CASES ¶ 69,778, 350 U. S. 299 (1956).

placency of law enforcement agencies and the public alike. I am confident that more vigorous prosecution of our criminal statutes, together with a concerted application of fiduciary principles, can be an effective combination in meeting the challenge which threatens responsible unionism. I am further confident that there is a growing body of responsible persons in management and labor which is awakening to the necessity of taking effective steps to insure that the ultimate beneficiary receives the benefits to which his labor has entitled him. **[The End]**

[See page 891 for a comment on Mr. Williams' paper by Robert Tieken.—Ed.]

Compulsory Unionism and Responsible Unionism

By SYLVESTER PETRO

The author is professor of law at the New York University School of Law.

THE FRAMEWORK of this paper may put in terms of the familiar propositions of two great nineteenth-century figures, Lord Acton and Mandell Creighton, his correspondent. I refer, of course, in the case of Acton, to the dictum:

"Power tends to corrupt and absolute power corrupts absolutely."

Creighton's statement—possibly even more germane—runs this way:

"Society is an organism and its laws are an expression of the conditions which it considers necessary for its own preservation."

Compulsory unionism, the institution which the so-called right-to-work laws are designed to extirpate, is of all the nonviolent techniques of trade unionism the most significant means to power. Absolute power exists nowhere in the area of action of mortal men; to that extent, Acton's declaration is wanting in precision. Yet, while union leaders are as unable as other men to command absolute power, the power they do build with and upon compulsory unionism is of such magnitude as to threaten the integrity and, therefore, the existence of a free society. Viewed in this light, the right-to-work laws must be seen as an expression of the conditions which this society considers necessary to its own preservation.

Before developing the thesis, however, I wish to observe that if compulsory unionism is the evil at which the right-to-work laws are aimed, they fall considerably short of the mark, for compulsory unionism takes many more forms than the union-security agreements (the closed shop, the union shop, preferential hiring, and maintenance of membership) at which the right-to-work laws strike. Workers are frequently compelled to join unions by these agreements which make union membership a condition of employment. Quite possibly, though, they are even more frequently compelled to join through the use by unions of the types of pressure tactics known loosely and vaguely as "secondary boycotts." These pressures, too—like those of, say, the closed-shop agreement—are designed to make union membership a condition of employment. Ultimately, the mode of coercion is the same: "Join the union or you don't work." So, in the typical stranger-picketing case, the union's objective is to proscribe the picketed premises; by discouraging pickups and deliveries—in general, by inducing secondary work stoppages—the union seeks to put such pressures upon the employees and the employer that all resistance will be squashed. Precisely the same is true of the kinds of action known as "hot cargo" agreements, black-listing, secondary strikes and, to use the broadest term, "secondary boycotts."

If there is an evil in compulsory unionism through economic coercion, then, it inheres as much in the pressure tactics to

which I have just referred as in the types of employment arrangement at which the right-to-work laws are directed. The topic assigned to me was "Right-To-Work Laws and Responsible Unionism." Yet I find it necessary, in order to deal adequately with the problems raised by that topic, to broaden the analysis, and so I have changed the title of this paper to "Compulsory Unionism and Responsible Unionism."

Union Leaders and Union Members

I am aware that the reverse of Acton's theorem is about as sound as the verse itself. Lack of power tends to corrupt, too; the absolute lack of power tends to corrupt absolutely. It tends to make persons contemptible, at least, if not corruptible. If associations of workers are to be responsible, then, they must have some power of some kind. Yet if they have too much power, of the wrong kind, derived in the wrong way, Acton's point becomes relevant.

The problem can be solved, I believe, by reaching an understanding of what is meant by "responsible unionism." Most will probably agree that what is meant is responsibility to workers and responsibility to society at large. Most will agree also, I believe, that when we speak of union responsibility we mean to exclude coercion, compulsion and exploitation of workers; extortion from employers; and antisocial, monopolistically established wages and prices. If it appears upon examination that compulsory unionism clashes with this conception of responsibility, we shall have to conclude that the relationship between right-to-work laws and responsible unionism is a positive one—to the degree, at any rate, to which the right-to-work laws tend to prevent compulsory unionism.

When we say that unions have a responsibility to workers, we usually mean, I believe, that union officers ought to be preoccupied essentially with promoting the interests of their constituents—the workers who have joined the union and designated it their bargaining representative. When workers choose union representation, they expect that their union will reflect their wishes, act in their behalf and attempt to secure from employers the best wages and working conditions, the best and fairest treatment possible. Union leaders are expected to obey the laws of the land and the precepts of common morality—to refrain from lying, stealing and cheating. At least they are expected to refrain from lying to, and stealing from, their constituents. Moreover, all concerned—workers included—expect union leaders to oppose employers in the negotiation process, not sell out to them.

It should be noted, however, that in the general juridical and social structure of the United States the responsibility of unions to workers is not a responsibility to *all* workers. Nothing in our laws or traditions goes quite so far as to make unions a branch of government.

Although the majority-rule principle in collective bargaining is a step in that direction, it is quite impossible for us to go the whole way without vitiating the basic political principles of this society. I doubt that we shall ever make unions genuine public agencies, any more than we have made business firms, churches, social clubs, or any of the other private associations branches of the state. Some states have gone in that direction with their "integrated bars"; but, in addition to the experimental nature of that movement, one should note that lawyers occupy a position in the juridical structure which clearly distinguishes them from trade unions or, indeed, any other economic association. Judgment on the merits of the integrated bar must be suspended, but in any event there is little occasion to reason from what has been done with associations of lawyers to what may be done with general employee organizations.

In this society, there is only one association in which membership is compulsory and universal; that association is the state. The state alone has responsibility in respect of all. At least at present, therefore, it would be erroneous to confuse the clear responsibility which unions have to their members with an equal responsibility to all workers. The consequences of such an identification would be anomalous and contradictory in an extreme degree, as only a moment's reflection will indicate.

If the union is regarded as a voluntary, private association—committed primarily to the advancement of the interests of its membership—certain consequences follow. Restricting ourselves for the moment to union responsibility to the membership, we should note, in the first place, that in unions—as in all private associations—the ultimate check which members have on their leadership lies in the freedom to shift their allegiance when dissatisfied. The law of fiduciaries has much less to do with the performance of corporate managements, such as it is, than the fact that stocks once bought can be sold.

Nothing could possibly be of greater efficacy in inducing union officers to perform responsibly than the freedom of workers to shift their affiliations as disgruntled stockholders may and do. This freedom is drastically impaired if such a shift must be —as it is under compulsory-unionism conditions—at the expense of one's job. As a careful student of labor relations in Great Britain, Professor J. Henry Richardson has quietly observed that "union leaders may be less considerate of their members' interests if workers no longer have the safeguard of leaving the union and still be able to find work."[1]

It is sometimes said that unions need the power of compulsion in exactly the same way that any other organization needs it if objectives are to be attained. No corporation could get anywhere, this argument runs, if those in charge did not have the power to command the full obedience of administrative officers.

Few will deny that when a union as an institution formulates objectives, its administrators should either carry out the necessary steps, resign or be discharged. Union officers, like corporate officials, agree when they take their posts to act in accordance with the duly formulated and authorized objectives of their organizations. The same is true of the rank-and-file worker and union member. He, too, in joining a union or taking a job, agrees to be "loyal" to his union or employer; it is understood that if he cannot be loyal he must be prepared to resign or to lose his membership or job.

But when these considerations are properly understood, they add up to an overwhelming argument *against* compulsory unionism, not in its favor. No business firm in this country has the authority to compel anyone to invest in it or to be employed by it, either as rank-and-file worker or administrator. Furthermore, any worker dissatisfied with the pay or the working conditions of his employer is free to quit and to seek work with any other firm. He will more often than not seek and find work with a competitor of his first employer—a firm in more or less the same line of business. The same is true of corporate officials. They, too, usually go to a competitor; or they will sometimes set up a competing firm.

However, the authority to compel membership which unions seek would place them, ultimately, in the position of the state—a position which would give them powers of compulsion as close to absolute as exist in the real world. They seek, and will probably achieve—if not restrained—a degree and scope of power which no business firm or any other private association has ever had or can have in our system.

With the instruments and devices of compulsion now available, and which they struggle so mightily to retain, trade unions already have in large measure—and will undoubtedly secure to an even greater degree before long —universal, industry-wide compulsory unionism. Whereas industry-wide employer control does not exist, industry-wide unionism is even today almost a general rule, and universal industry-wide unionization is a well-known union goal. Almost everywhere that a worker goes in a good many industries today, he finds a union in power. Under the conditions of compulsory unionism which unions seek to maintain, and which the right-to-work laws combat in part, what are the prospects of responsive, responsible unionism?

I call here again upon the observations of Professor Richardson, in his cited work. He points out:

"Operation of the closed-shop principle denies the right of workpeople to withdraw from a union in the future if they have become dissatisfied with its policy or leadership. It also stands in the way of the formation of rival unions. Yet the right to set up a rival union is included in freedom of association, and to take away this right could weaken the vitality of the trade union movement. Groups of workpeople may hold quite different views upon trade union policy and methods, and if they cannot reach agreement they are likely to form separate unions . . . . Again, where only one union has hitherto operated some of the members may consider that its policy and leadership have become too extreme and aggressive or too complacent and spineless, and if they are unable to bring about a change from within, they may cease to be members or may decide to form a rival union. Differences may arise not only on the industrial policy of a union but also on the question of the union identifying itself with a particular political party."

Professor Richardson's reference to political considerations should be emphasized. There is really very little wrong in permit-

[1] J. Henry Richardson, *An Introduction to the Study of Industrial Relations* (1954), p. 188.

ting a genuinely voluntary association to use some of its funds in political activity. In fact, as the sad career of the law prohibiting political expenditures by trade unions is revealing, legal control of such expenditures is hopelessly misguided. Yet there is almost everything wrong with allowing an organization to have both the power to compel membership and the authority to spend membership contributions in ways contrary to the desires of the members. Since direct legal control seems extremely difficult, if not impossible, the solution would seem to lie in repeal of the law prohibiting political expenditures and in enactment and enforcement of laws prohibiting compulsion to membership. Then the person distressed by the use of his money to advance repugnant causes will have the right—as every free man should—of resigning without giving up his livelihood.

I am perhaps less stunned and shocked than I ought to be by the findings of the current investigation of the conduct of some trade-union officers. Yet anyone who has had his wits about him must have known, or at least suspected, what has been going on. Indeed, all one need know is that unions have the kinds of power that they have, and the rest may be predicted on a priori principles. In this sense and to this extent, Acton's dictum is relevant. No human agency having the virtual privilege of both physical and economic coercion can escape a material degree of corruption. Establish an environment permeated with coercion and compulsion, and you are bound to attract men who excel in those arts; if they do not excel at first, they will either have to learn or make way for more talented men. This is not very complicated. Workers who have had to become accustomed to being pushed around, who are subject to the rigorous controls of compulsory unionism, can do nothing but bear the oppression and exploitation of their leadership.

It is as absurd to expect responsible unionism in conditions of extensive compulsory unionism as it would be to expect responsive and responsible government in a society where the divine right of kings or the dictatorship of the proletariat is the central political principle. If union leaders are to be responsible to the membership, they must be agents subject to the members, not their masters. When men are forced in the first place to join unions, forced in the second place to go along with all plans and programs conceived by their leaders and forced in the third place to keep their peace if they wish to keep their jobs, it is not at all surprising to find a good many trade-union leaders less than responsible to their membership. The same is bound to be true in any human organization.

Power grabbed by force and exercised subject to no pervasive structural or functional check is bound to corrupt; if a free society wishes to preserve itself, it is going to have to take that power in hand somehow. This, I believe, is what accounts in part for the spread of the right-to-work laws.

Social Responsibility

Although we hear a lot about "labor statesmanship," "public responsibility of trade-union leaders" and even "trade-union morality," such talk is not to be taken too seriously. It is really only another reflection of the queer collectivist ideology and "public relations" approach so characteristic of our day.

Talk of "social responsibility" makes sense only when we are conscious, in so speaking, that we are looking in another way at the humble and earthy realities to which I have already referred: that things do not work out satisfactorily from a social point of view when, in any private association, force and compulsion make up the common modes of operation. To put the matter briefly, the social responsibility of trade unions is nothing more than the obligation of union members and officers to refrain from pushing other people around.

Consider the recent action of the Ethical Practices Committee of the AFL-CIO in respect to the Teamsters Union. Finding some Teamsters officers guilty of "corrupt activities offensive to trade union morality," the committee in effect recommended the ouster of the Teamsters from the federation if the offending officers are retained. "We think," the committee declares, "the 1,400,000 members of the Teamsters Union want and are entitled to have a clean union."[2]

These findings and declarations raise two questions. Assuming that the members of the Teamsters are entitled to have a clean union, how effective will the parent federation's condemnation of some of the present Teamsters' officers be? The ethical practices committee is not even scratching the surface of that problem. It is not inquiring into the organizational methods of the Team-

[2] *The New York Times*, September 19, 1957, p. 21. [On October 24 the AFL-CIO Executive Council suspended the International Brotherhood of Teamsters until certain abuses are corrected.—Ed.]

sters—methods which are largely aggressive, compulsory and coercive. Nor is it inquiring into the operational techniques; techniques which are for the most part oppressive and monopolistic. Even if the officers condemned by the committee should be rejected, can one expect the resulting situation to be materially different? If nothing changes except the top officers of the Teamsters, if all else remains the same—what has been accomplished?

From this arises the second question: Is the wide concern so evident today with trade-union practice evoked only by the personal conduct of the present trade-union top leadership? Almost certainly not. The focus of concern may differ somewhat from one person to another, but the true basis of concern lies in the character and structure of union organization and in the way in which unions act in the so-called collective bargaining process.

In the organizational stage, union conduct is characterized to a considerable extent by coercion, both physical and economic. Union organizers sometimes sell unionism to workers, but with great frequency union membership is forced, not sold. Most often, the coercion is of the economic type. Organizational picketing, hot-cargo contracts, blacklisting, secondary strikes and other kinds of boycotts, and compulsory unionism agreements —these are the most usual methods of forcing unionization upon unwilling employees and employers. Outright violence is used when economic coercion fails. Those who doubt this simply are unaware of what is going on. Moreover, it must be understood that such conduct is not used only by unions which have felt the wrath of the Ethical Practices Committee of the AFL-CIO. There is scarcely a large union in this country which has not used and is not using one or more such methods today.

The consequence of the wide use of these coercive methods, as I have elsewhere said, "is a general structure of unionization in this country which bears no necessary relationship whatsoever to the desires of individual workingmen."[2] Furthermore, it leads to union practices which cannot be reconciled with the free market upon which we rely as consumers for protection from monopolistic oppression. When a union does not have the stranglehold upon an entire industry that the Auto Workers or the Plumbers have, it is common to see its strikes supplemented with violence. No one can reasonably object to the use of the simple strike for higher wages—the unadorned and pure concerted refusal to work. But when violence occurs, social responsibilities of the most basic kind are flouted, and all members of society are oppressed. Violence is in itself a social evil. In the usual case it involves a physical assault upon persons who prefer not to join the striking union in the pursuit of its objectives—a preference which is within the rights of every man in a decently ordered society.

But the social wrong implicit in strike violence goes beyond the interests of the persons whose physical integrity has been violated. Union violence is intended to, and does often, secure wages and working conditions higher and more costly than would be forthcoming in a free market. Men willing to work at less pay than the union is insisting upon are by violence precluded from serving society. Workers and consumers pay for the higher costs which this form of extortion exacts—workers because there will usually be less employment at the higher wages, consumers because, usually, prices will be higher. Notwithstanding these untoward social consequences, I have yet to hear the statesmen in the AFL-CIO Ethical Practices Committee threaten the expulsion of unions which use violence in connection with their so-called collective bargaining.

When a union is in the position of the Auto Workers or any other tightly organized industry-wide union, it achieves the same socially harmful ends without having to use violence—at least without having to use it habitually. The industry-wide union is about the closest thing to the true, pure monopoly to be found in the United States today. It is an agency which has achieved power through coercive means and has virtually exclusive control of a resource—human labor—for which demand is relatively inelastic. Any good text in economics will explain that these are the conditions necessary to the kind of social exploitation associated with monopoly. It is highly doubtful that any commercial or industrial firm in this country possesses the monopoly characteristics necessary to exploit consumers. We have reached a stage of complex competition such that the demand for almost every consumer good imaginable is elastic to a considerable degree; this is the situation, of course, which materially reduces the power of any business firm, however big, to exploit consumers.

[2] *The Labor Policy of the Free Society* (1957), p. 112.

It is true that the demand for human labor as a means of production can get tolerably elastic in specific instances; men in specific jobs can sometimes be replaced to some extent by machines. But in the nature of things, the demand for labor is in an over-all sense final, ultimate and relatively inelastic—relatively, that is, to the demand for specific material goods. When a union has secured control of all the labor in a broad industry, and keeps this control in the iron grip of force and compulsion, society is faced with true monopoly power. No better example of such power is available than the United Automobile Workers, and no organization in this country, including the Standard Oil Company during the nineteenth century, has ever gone about the job of building up and exercising monopoly power more skillfully or more ruthlessly.

There can be no doubt at all that ordinary morality and trade-union morality overlap at certain points. Both condemn stealing. But it is evident that a good many things in trade-union practice which offend ordinary people seem inoffensive, perhaps even laudable, to those guardians of trade-union morality, the members of the Ethical Practices Committee of the AFL-CIO. Economic and physical coercion in the organizing process, and violence and monopolistic pressure in the bargaining process have never been the preoccupation or concern of the committee. There is nothing particularly wrong in that. The members of the committee have a right to broaden or to limit their interests as they will. However, if *our* interest is in fixing the social responsibilities of trade unions, we are compelled to conclude that something more than the help of the ethical practices committee is required.

The right-to-work laws are today the most striking responses of society to the threats posed by big unionism. As I have already observed, they offer only a fragmentary corrective; compulsory unionism, leading to socially dangerous industry-wide unionism, takes a variety of forms which the right-to-work laws do not reach. Nevertheless, the right-to-work laws, unlike the fulminations of the ethical practices committee, go to the causes of the conditions which preoccupy us currently; they do not divert attention and energy to the superficial results of basically bad conditions.

There is of course no guaranty that strictly voluntary unions will always be run well or that they will never pose the grave dangers to the market economy which present industry-wide unions are posing. Yet when one realizes that present-day industry-wide unions have achieved their position through the use of force, violence, economic coercion, and government assistance and connivance, one may reasonably believe that the elimination of those things may help to bring about a healthier state of affairs. A union which is the free and uncoerced choice of its membership is certain to be an organism essentially different from an organization which has compelled unwilling persons to enroll. Being a different kind of thing, it is likely to act differently. Resting on the consent and volition of the membership, the union's leadership is likely to be a great deal more solicitous and probably a great deal more honest in relationships with its members.

Strictly voluntary unions, again, are likely to be smaller and less widely dispersed than the giant compulsory organizations which we now know as trade unions. As such, they will probably be run better; defects in their operation are likely to be more speedily corrected. More important than that, they will not be in a position to exert monopoly power; in that respect, society will be the gainer.

Such, I think, is the rationale of the right-to-work laws. When one reads the text of the latest such law—the Indiana law of 1957—it is hard to believe that the right-to-work laws are designed, as is so often charged, to "bust unions." All these laws are specifically intended, and are tightly drafted, to protect free employee choice as much against employer coercion as against trade-union coercion. The Indiana law declares:

"It is the public policy of the state that membership or nonmembership in a labor organization shall not be made a condition to the right to work or to become an employee of or to continue in the employment of any employer; that employees shall have the right of self-organization and the right to form, join, continue membership in, or assist labor organizations; and that employees shall equally have the right to refrain from forming, joining, continuing membership in, or assisting labor organizations . . . ."

One intent upon destroying trade unions would scarcely frame a law in such terms. On the other hand, a free society intent upon expressing the conditions necessary for its own preservation would, I believe, be well advised to have such a law.

[The End]

Civil Rights and Liberties and Labor Unions

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THE TOPIC assigned to me—"The Denial and Withdrawal of Union Membership and the Concept of Due Process"—is not only a tough mouthful to say, but far too large an undertaking for the ordinary harried practitioner. Luckily for me, the conference authorities appear both reasonable and friendly, and I hope I may treat only a few random segments of this large subject without having my membership in the Amalgamated Labor Eggheads denied or withdrawn. Limiting this broad topic to a few areas where denials of union membership or other union rights impinge directly on issues of civil rights and liberties will not only help bring this paper within manageable proportions, but will also have the unique advantage of giving the speaker a subject with which he has some slight familiarity. While this has never been a requirement for speaking by any member of the Amalgamated Labor Eggheads, it is not an altogether meaningless asset in a group where every member is quite confident that he knows considerably more about each topic than the speaker.

Turning first to the denial of membership in labor unions, there are, of course, many grounds utilized by various unions for excluding workers from membership. Among these are dual unionism, absence of citizenship, supervisory nature of work, Communist affiliation, race or color, lack of apprenticeship requirements, etc. Then, too, high initiation fees are still utilized in a number of industries as a means of limiting union membership and opportunity for employment as well. But the two exclusions that bring the issue of due process into sharpest focus are in the area of civil rights and civil liberties—denials of membership because of race or color or because of Communist affiliation.

Color is a disqualification for membership in the railway unions and in some others as well. The Constitution of the Brotherhood of Locomotive Engineers, for example, provides that "no person shall become a member . . . unless he is a white man"; the Constitution of the Brotherhood of Locomotive Firemen and Enginemen provides that an applicant for membership must be "white born"; and so on through the list of the major railway unions.

It should be recalled right at the outset of an examination of this problem that both the Taft-Hartley Act and the Railway Labor Act forbid the union from procuring the discharge under a union security provision of a Negro excluded from union membership. It should also be recalled that the *Steele, Tunstall, Graham, Howard, Wallace* and *Syres*[1] cases make it unlawful for a bargaining agent under either the Taft-Hartley Act or the Railway Labor Act to discriminate against the Negro workers in the bargaining suit. One might conceivably argue from this—and I have actually heard this argument suggested by lawyers for some of the all-white unions—that the Negroes should be quite happy with this situation. After all, they are able to hold their jobs even in union security situations without paying dues and to obtain the benefits of collective bargaining without having to share its burdens—an ideal "right-to-work"

[1] *Steele v. Louisville & Nashville Railroad Company*, 9 LABOR CASES ¶ 51,188, 323 U. S. 192 (1944); *Tunstald v. Locomotive Firemen & Enginemen*, 9 LABOR CASES ¶ 51,189, 323 U. S. 210 (1944); *Graham v. Southern Railway Company*, 17 LABOR CASES ¶ 65,399, 338 U. S. 232 (1949); *Howard v. Thompson*, 21 LABOR CASES ¶ 67,004, 343 U. S. 768 (1952); *Wallace v. NLRB*, 9 LABOR CASES ¶ 51,187, 323 U. S. 248 (1944); *Syres v. Oil Workers, Local 23*, 29 LABOR CASES ¶ 69,550, 350 U. S. 892 (1955).

situation. Since these Negroes reap the benefit of collective bargaining without cost to themselves, it is argued that Negroes are seeking union membership in these circumstances primarily for the social affairs of the union and here, say our apologetic friends, Negroes are quite properly excludable.

But this is a wholly formalistic and unrealistic view of the union's role and its effect upon each individual in the bargaining unit. No collective bargaining agent can possibly accord equal treatment to nonmembers in the day-to-day activities of the union. Nonmembers cannot attend meetings or participate in the descisional processes of the union; they cannot vote for those who will represent them. The elected officials of a union—and, like any other politicians, they are officials periodically up for re-election—can hardly be expected to devote themselves as wholeheartedly to the interests of those who cannot vote as they do to the interests of those who can. A union leader could hardly be blind or indifferent to the interests of Negro workers in the bargaining unit if they could vote for the bargaining representatives and otherwise express themselves.

One's initial reaction to this problem, or at least mine, is that it is a clear violation of the due-process clause for Congress to create machinery under which the bargaining agent becomes the exclusive representative of each and every worker in the unit and yet to permit that bargaining agent to exclude from membership, on grounds of color, a part of those represented. Yet the little law available on this question is far from clear, due partly, I suppose, to the hangover of old doctrine analogizing labor unions to clubs, lodges, and other social bodies. Chief Justice Stone, while holding in the *Steele* case that the Brotherhood of Locomotive Firemen and Enginemen could not enter into discriminatory contracts injurious to the Negro nonmembers, uttered the dictum that the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership," a gratuitous ratification of the prevalent practice of excluding Negroes from membership. There is no other appellate federal pronouncement on this point, and a recent Wisconsin Supreme Court case, although clearly distinguishable, treats the Stone dictum as law. Although a 1947 Kansas Supreme Court decision, *Betts v. Easley*,[3] does take a contrary view, one could hardly rely on this decision to indicate the state of the law.

A case now pending in the United States Supreme Court on petition for a writ of certiorari raises the exact issue we are here considering (*Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*[4]). The plaintiffs there, a large number of Negro railroad firemen, brought suit against the all-white brotherhood in the United States District Court at Cleveland, Ohio, contending that racial exclusion from the statutory bargaining representative is either a violation of the Railway Labor Act as interpreted in the light of the Fifth Amendment or a violation of the Fifth Amendment itself. Essentially, the plaintiffs' contention there is simply that, where Congress vests a union with power to act as the exclusive bargaining representative for a group of workers and thereby prevents the individual from bargaining in his own behalf, it is a denial of due process to any individual in that group to require him to accept representation by persons in whose selection and election he has no voice or vote and over whose conduct he can exercise no control. Congress cannot subject Negro citizens to representation by white citizens under a system of racial paternalism.

The plaintiffs in the *Oliphant* case did not, however, rest their case on legal theory alone. They sought to demonstrate at the trial that racial exclusion necessarily precludes fair representation and to prove that there had been continuing specific discrimination by the bargaining agent against Negro nonmembers; therefore, argue plaintiffs, they must be admitted to the union as a means of making possible the fair and equal treatment required by the *Steele* case. While courts may remedy major discriminations as in *Steele*, they cannot deal with day-to-day discriminations such as the rejection of a valid grievance or the negotiation of a rule change which bears more heavily on one group than another.

An analogy can be drawn here to the school cases prior to the 1954 desegregation decisions. Where persons entitled to equal treatment under the discarded doctrine of "separate but equal" were denied equal school facilities, the Supreme Court ordered their admission to the all-white schools as the only effective relief. See, for example, *Missouri ex rel. Gaines v. Canada*[5] and *Sweatt v. Painter*,[6] So here, where the denial of membership means discrimination, membership

[3] 11 LABOR CASES ¶ 63,207.
[4] 33 LABOR CASES ¶ 70,992 (1957).
[5] 305 U. S. 337.
[6] 339 U. S. 629.

is the best remedy to cure that discrimination. Of course, the Supreme Court may well go beyond its decision in the *Steele* case and hold that, all apart from proof of actual or potential discrimination in bargaining, separation and exclusion from the bargaining representative on the ground of color is itself inequality for the separated minority. Certainly, if the psychological inequality implicit in separate schooling is inherently unequal, then the exclusion of Negroes from the process of the formulation of their working conditions and the election of their bargaining representative is even more patently a violation of due process of law.

The brotherhood defendant in the *Oliphant* case is forcefully contesting the plaintiffs' right of admission. It argues that Congress clearly ratified the practice of excluding Negroes from the bargaining union when it passed the 1951 amendment to the Railway Labor Act permitting the union shop on the railroads, knowing full well that this racial exclusion existed. Furthermore, argues the brotherhood, exclusion is not sufficiently arbitrary to rise to the dignity of a violation of due process of law.

On the question of actual discrimination, the brotherhood makes a strange reply: True, they say, the Negroes cannot go to meetings of the union and discuss the demands to be made upon the railroads or the grievances to be pressed, or the like. True, they say, the Negroes cannot vote for the persons who represent them. But, says the brotherhood, the white members do not control the conduct of their officers either, so the Negroes are not substantially disadvantaged. The argument appears to be that, once the officers are elected, the white membership has no means of control over the officers of the union who bargain and present grievances on their behalf and, therefore, there is no discrimination against Negro nonmembers. But one might as well apply this argument to our electoral system as a whole. Far more than officials of a union, Senators and Representatives exercise their own judgment in action taken as representatives of their state or district. Yet no one would contend for that reason that the right to cast a vote in a federal election is a meaningless or useless right and, indeed, we have just witnessed a historic Congressional battle over this very electoral right.

The history of liberty is a history of the limitations of governmental power, not the increase of it. When we resist . . . concentration of power, we are resisting the powers of death, because concentration of power is what always precedes the destruction of human liberties.

—Woodrow Wilson

The district judge in *Oliphant* had a simple answer to all of the plaintiffs' arguments. He found that "sufficient Federal action is not shown . . . to change the character of the [union] organization from that of a private association to that of a government agency" and, therefore, the union was free to act as it saw fit, any discriminations to the contrary notwithstanding. Despite the *Steele* decision and the many cases that follow it, the judge apparently believed that the government's thumb, if on the scales at all, was there too lightly to warrant interference by the court in the matter of union membership.

Whether we shall soon have a resolution by the Supreme Court of this fundamental issue remains to be seen. There is pending in the Supreme Court not only the *Oliphant* case (in which the plaintiffs seek to bypass the United States Court of Appeals), but also the case of *Conley v. Gibson*,[6] involving, at least peripherally, the practice of the Brotherhood of Railway Clerks and various construction unions, of maintaining separate locals of white and Negro workers, with the white local handling the collective bargaining for both. There would seem to be little difference in principle between the denial of membership, such as is involved in *Oliphant*, and the limitation of membership to unequal "Jim Crow" status, such as may be involved in *Conley*. In any event, the issue is on the way towards final resolution; the trend of decisions in the Supreme Court can leave but little doubt as to the ultimate outcome.

One might ask where the National Mediation Board and the National Labor Relations Board have been while all this was happening. Of course, it is the National Mediation Board that has had the responsibility in this area with respect to the railway unions; I do not think it unfair to record here that the board has generally been on the side of discrimination and ex-

[6] 30 LABOR CASES ¶ 69,887 (1956).

clusion. Indeed, the 1941 Southeastern Conference Carriers Agreement, by which the railroads and the Brotherhood of Locomotive Firemen and Enginemen excluded Negro firemen from many jobs and which was outlawed by the *Steele* case, was actually mediated and countersigned by the National Mediation Board.

One would have thought that the National Labor Relations Board, an independent agency and not simply the mediating arm of a particular industry, would have lent its sanction and authority toward the elimination of racial discrimination by labor unions. But such is not the case; the Board has refused to act in the matter of racial exclusion. In a 1943 decision, the Board did give promise of affording relief in this area: "We entertain grave doubt," said the Board, "whether a union which discriminatorily denies membership to employees on the basis of race may, nevertheless, bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race." But the Board found it unnecessary in that case to decide "whether the discriminatory exclusion from membership on racial grounds of employees in the appropriate unit deprives such excluded employees of their full freedom of association, self-organization, and choice of representatives, which the Act was designed to protect."[7] The hope engendered by this language was shortly shattered in *Atlanta Oak Flooring Company*,[8] where the Board was "unable to agree that the segregation into separate locals is, per se, a form of racial discrimination in violation of the National policy and of the Fifth Amendment." Very shortly thereafter, in *Larus & Brothers Company*,[9] the Board found that it lacked authority to pass upon racial eligibility requirements for membership in a labor organization; on a number of other occasions, the Board has repeated that rather narrow view of its own powers.[10] Its present position of lack of jurisdiction does not even leave room for seeking relief before the Board if and when the Supreme Court finds the exclusion of Negroes unlawful.

In the matter of exclusion from membership, it might at least be said in the Board's behalf that the Board had no obligation to step out and create new law, but not even this defense can be asserted for the Board on the subject of actual hostile discrimination by a union against Negroes in the matter of job rights. Thus the General Counsel determined a number of years ago in an unpublished decision that no violation of the act occurred when a labor union obtained the dismissal of a Negro from his job on racial grounds. In 1952, the General Counsel took the position that despite the Supreme Court's decision in the *Steele* case, and the application of that same doctrine to the National Labor Relations Act in *Wallace Corporation v. NLRB*,[11] he could find nothing in the Taft-Hartley Act which made it an *unfair labor practice* to bargain discriminatorily and unfairly against excluded minorities. In the memorandum for the NLRB filed in 1952 with the Supreme Court in the case of *Ford Motor Company v. Huffman*,[12] the Board and its counsel took the position that the right to equal representation, in view of the absence of affirmative legislative history, could not be found implicit in Section 7 of the act so as to render violations of that right an unfair labor practice within the terms of the act. Other than the power to refuse certification, which the Board has failed to exercise, it could find no provision in the act which would provide an administrative remedy against discrimination by labor unions.

Returning now to the issue of exclusion from union membership because of race or color, this area of discrimination appears to be lessening, along with the generally receding tide of discrimination. While I have not seen any figures comparing the number of unions that have racial exclusions today as against some years ago, there is undoubtedly a large decline in the number of such unions. Furthermore, some 40 unions now have specific provisions in their constitutions providing for admission to membership regardless of race, creed or color. The constitution of the AFL-CIO makes clear its firm purpose: "To encourage all workers without regard to race, creed, color, national origin or ancestry to share equally in the full benefits of union organization." While it is discouraging to see the railway labor unions admitted to the AFL-CIO with constitutions contravening this provision, it is certainly to be hoped and, indeed, to be expected that their admission will bring a change in attitude and in constitutions at their next conventions.

[7] *Bethlehem-Alameda Shipyard, Inc.*, 53 NLRB 999, 1016.
[8] 62 NLRB 973.
[9] 62 NLRB 1075.
[10] See *Norfolk Southern Bus Line*, 83 NLRB 15; *Veneer Products*, 81 NLRB 492.
[11] 9 LABOR CASES ¶ 51,187, 323 U. S. 248, 255.
[12] 23 LABOR CASES ¶ 67,505, 345 U. S. 330 (1953).

It is not too much to hope that this is a receding problem in the American labor movement and one in which the end is not too far distant.

I would like to turn now to a less-discussed exclusion from union membership. More than 60 unions covering between 6 and 7 million members have constitutions specifically barring "Communists" and other "subversives" from membership. Some of these constitutions are very explicit and list the groups that the union considers subversive; others exclude "all who oppose the American form of Government" or who "advocate the overthrow of the American form of Government by force and violence." Many of the other unions without constitutional provisions in this field have potential methods of barring Communists through direct action of local unions or through the application of the "fraternal" system of admittance, by which applicants can be rejected by majority vote or by blackballing on the local level. The serious due-process and civil-liberties questions here raised have been avoided to date only by the general failure of unions to enforce these provisions.

It should be recalled again, as we did in the case of the racial exclusions, that a union probably cannot procure the dismissal of a Communist from his job because of his nonmembership in the union. However, a union can likely accomplish much the same result by quietly inviting the employee's dismissal as a Communist without regard to the question of whether he was a member of the union and then just meekly accepting the decision of management as "just cause" for the dismissal. Indeed, whenever management acts to dismiss a Communist, it is somewhat inconsistent for a union barring Communists from membership to take the dismissal up as a grievance and to argue that the man was quite clearly fit for employment even though he was not fit for union membership. One can hardly picture a union barring Communists from membership litigating General Electric's dismissal of a number of Fifth Amendment employees as did the United Electrical Workers right up to the court of appeals.

Furthermore, there seems to be some question whether the NLRB will ever under any circumstances take action in this area. In 1951 the General Counsel refused to issue a complaint where a union, having expelled a member who had signed the Stockholm Peace Petition and was alleged to be a Communist, had thereafter gone to the employer and obtained his removal from employment. Said the General Counsel "The underlying reason for the discharge was the individual's established communist activity, which was resented by the employees and the union, and was a subject of great concern to the employer if only for the reason that it caused considerable unrest among the employees. This alleged activity was, of course, not protected by the act, and a discharge because of it would not be an unfair labor practice. Although, in view of the well-established collective bargaining relationship between the employer and the union, the individual's discharge was effected following disciplinary action against him by the union because of his activity, it was not believed that this altered the basic fact that his discharge was for a reason unrelated to protected concerted activities." [13]

It does seem to me that Senator Taft was clearly right when he remarked, on this ruling on the Stockholm Peace Petition employee and a companion ruling (97 *Congressional Record* 6062): "In separate opinions where individuals were discharged pursuant to valid union shop contracts for loss of union membership not occasioned by nonpayment of dues, the General Counsel refused to issue complaint . . . . In both cases the individuals could have been discharged by the employers on their own motion, although they first learned the facts from the union. To hold, however, that they could be fired upon the union's demand for loss of membership under the union-shop contract or because the union members refused to work with them opens the door to old abuses and endangers the job security of American workmen."

The purported justification for exclusion of Communists from membership in unions is, of course, their rule-or-ruin record of seeking to bend the unions they infiltrate to Communist Party or even Soviet Union objectives. One can affirm this record of Communist treachery in the labor movement without excluding the possibility that some lesser remedy than exclusion from membership will protect the union. It would seem likely that the lesser remedy of denying Communists the right to hold appointive or elective office, thus supplementing the non-Communist oath affidavit provisions of the Taft-Hartley Act, would prove adequate to cope with the problem of Communists in trade unions. Thus, the United Automobile

[13] Ruling No. 72, March, 1951.

In short, the lawyer aims at victory, at winning in the fight, not in aiding the court to discover the facts. He does not want the trial court to reach a sound educated guess, if it is likely to be contrary to his client's interests. Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation.

—Jerome Frank

Workers, which has no bar whatever against the admission of Communists to membership, provides in its constitution that "no member of any Local Union shall be eligible to hold any elective or appointive position in this International Union or any Local Union . . . if he is a member of or subservient to any political organization, such as the Communist, Fascist or Nazi organization which owes its allegiance to any government other than the United States or Canada, directly or indirectly." It has certainly been the experience of the UAW —once a battleground of "isms" in America —that this provision, coupled with progressive democratic leadership, is adequate to protect the union against Communist influence.

Nor is there any national security interest in the denial of union membership to Communists. The Defense Department's industrial-security program is more than adequate to screen any Communist or other security risk out of any position where he would have access to our nation's secrets. To deny a man union membership—and thus to deny him the economic protection of the union—is to make a quasi-outlaw of one whose conduct is not subject to criminal prosecution. The difficulties of determining who is and who is not a Communist require difficult judgments predicated on inadequate evidence in situations where wrong decisions may mean damaged lives. On must never forget that assaults upon the civil liberties of trade unionists plagued the labor movement in America for many years. The union movement has a vital stake in the continued protection of those civil liberties.

The few judicial decisions, it is not surprising to learn, have gone squarely against the asserted rights of Communists to union membership and officership. In *Garcia v. Ernst*,[14] a New York court upheld the firing from officership of Communist Party members; in *Weinstock v. Ladisky*,[15] another New York court upheld the exclusion of Communists from union membership. Of course, the restrictions on Communists in the labor movement upheld by the Supreme Court in the *Douds* case require no elaboration here. But a sentence in the more recent decision of the Supreme Court in *Black v. Cutter Laboratories*[16] is worthy of analysis. Speaking of a hypothetical agreement between an employer and a union, Justice Clark said for the Court: "It is clear that the individual parties might have agreed that the circumstance of Communist Party membership would constitute 'just cause' under the contract and no Federal question would thereby be raised." Mr. Justice Douglas, speaking for the dissenters, took issue with the Court's dictum and took pains to point out that a statutory bargaining representative exercising federal powers "may not make discriminations that the Government may not make." For Justice Douglas, the *Steele* dictum is as applicable to Communists as to Negroes.

Turning now to union procedures for expulsion or lesser discipline, these procedures are so varied as to defy any general description. Practically every union constitution, as a 1955 study by the National Industrial Conference Board points out, contains some provision granting the accused the right to a hearing and to testify and present evidence in his own defense; a convicted member may generally appeal the verdict upward through superior organs up to and including the union's convention. But not unlike the various government loyalty and security programs that we have seen over the last few years, the charges are often all too vague, the proof all too weak and the decisions all too involved in passion and prejudice rather than careful reasoning and logic.

The dangers in existing expulsions and disciplinary procedures are less the deficiencies in existing formal procedures than a widespread fear in some unions that criticism of the leadership or of some proposed action may result in expulsion or some lesser disciplinary action. The Senate Select Committee on Improper Activities in the Labor or Management Field has received

[14] 19 LABOR CASES ¶ 66,044 (1950).
[15] 18 LABOR CASES ¶ 65,797 (1950).
[16] 30 LABOR CASES ¶ 70,002, 351 U. S. 292 (1956).

a substantial volume of mail expressing this fear; its existence is a significant element, whether justified or not.

The problem of expulsion and disciplinary action appears less one of the exact procedures to be followed than it does one of over-all union democracy. Wrongful expulsion or wrongful discipline will ordinarily be less a result of procedures which offend due process than of general undemocratic conditions prevailing in the union that make even careful procedures of little significance.

One may speculate that the only expulsion or disciplinary procedure which will not only insure a fair result, but will give the union rank and file confidence that a fair result will be had, is one which provides for outside review at some appellate stage. What makes due process a reality in our governmental structure is our system of separation of powers, so here an appeal to outside sources is the best assurance of fair treatment and due process in the expulsion and disciplinary processes.

Two unions have such appeals bodies, consisting of distinguished citizens outside the union movement. The constitution of the Upholsterers International Union, AFL-CIO, states that "the appeals board shall consist of impartial persons of good repute not having membership or any other direct interest in the Upholsterers International Union or its affairs, who shall be selected by the convention and serve for such term as the convention may determine." The United Automobile Workers has only this year created a public review board, whose members are chosen at conventions with "the authority and duty to make final and binding decisions on all cases appealed to it" and "to deal with matters related to alleged violation of any AFL-CIO ethical practices codes and any additional ethical practices codes that may be adopted by the International Union."

The success of these boards in insuring internal due process in trade unions will depend, no doubt, on the integrity, industry and independence of their members. If these qualities are present, a new force for due process in trade unionism may well have been found.

I should like to note one other problem in a more or less related field—the problem of fair treatment for those seeking or holding union office. This problem has come to the fore recently in connection with various union elective or appointive officials who plead the Fifth Amendment.

Certainly, unions which demand of management the highest standards of fair treatment and due process for their employees must accord this same treatment to their own elective and appointive officials. In this respect it seems to me that the union movement has acted with considerable wisdom and restraint, but has been its own worst enemy in its public statements.

In January of this year, the AFL-CIO Executive Council adopted a statement on racketeering, which included the following:

"We recognize that any person is entitled, in the exercise of his individual conscience, to the protection afforded by the Fifth Amendment and we reaffirm our conviction that this historical right must not be abridged. It is the policy of the AFL-CIO, however, that if a trade union official decides to invoke the Fifth Amendment for his personal protection and to avoid scrutiny by proper legislative committees, law enforcement agencies or other public bodies into alleged corruption on his part, he has no right to continue to hold office in his union. Otherwise, it becomes possible for a union official who who may be guilty of corruption to create the impression that the trade union movement sanctions the use of the Fifth Amendment, not as a matter of individual conscience, but as a shield against proper scrutiny into corrupt influences in the labor movement."

This statement, not unnaturally, was interpreted as meaning automatic removal for all elective and appointive officials of unions who pleaded the Fifth Amendment. It seems clear, however, that there was no such plan of automatic ouster for anyone pleading the Fifth Amendment. In the face of criticism of the AFL-CIO statement by various civil-liberties groups, an AFL-CIO spokesman told *Labor's Daily* on February 12 that the language quoted above was "not meant to apply automatically. The idea is that when a union official invokes the Fifth Amendment, his union should call him in and question him. In the absence of some satisfactory explanation, he would lose his office." The more recent pronouncements of the AFL-CIO indicate that there is no intention to treat the Fifth Amendment as an admission of guilt, but simply as a reason for investigation.

The United Automobile Workers seems likewise to have been misunderstood. A UAW administrative letter concerning the handling of this matter was construed in some circles as automatic ouster for those

. . . property and labor in different classes are essentially antagonistic; but property and labor in the same class are essentially fraternal. . . . Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance wheel of the social machinery. —Horace Mann

pleading the Fifth Amendment. Indeed, so distinguished an arbitrator as John T. Dunlop, in a decision rendered on July 1, stated that the UAW and the AFL-CIO apparently have adopted the policy of disciplining union officials in elective or appointive positions who invoke the Fifth Amendment. That this was not the proper interpretation is evidenced by the fact that seven minor local union officials of the UAW, who did plead the Fifth Amendment on various aspects of their testimony on past Communist affiliations before the Senate Internal Security Committee, have all been cleared after appropriate trial procedures. The plea of the Fifth Amendment was, as it seems to me it should have been, a reason for investigation and not a ground for action.

The Teamsters Union appears to take the position that a plea of the Fifth Amendment is not only no proof of guilt, but is not even a ground for investigation. Thus, the Teamsters' executive board statement of September 5 states that, "particularly where an individual has exercised his right under the Fifth Amendment, not to be a witness against himself, it would make a mockery of such right if the International Union, or any other body, were to require any such individual to make answer to the same matters concerning which he invoked his constitutional guaranty." But a union official accused of racketeering or of Communism can hardly avoid scrutiny by his own union simply by pleading the Fifth Amendment before a governmental body. The union's right to investigate and to make a decision on the facts before it cannot be suspended simply because the accused union official has a constitutional right to plead the Fifth Amendment in another forum. Due process does not require immunity from union scrutiny.

No doubt it will be suggested that the abuses of labor's fiduciary responsibilities discussed in this paper are not in the main stream of the abuses which are the chief matters of public attention and concern today. One would readily concede that corruption and racketeering are a far more obvious and virulent abuse of labor's fiduciary responsibilities than those here under consideration.

However, problems are not so easily divisible. Acceptance of fiduciary responsibilities and of public trust in one area breeds acceptance in others; rejection of fiduciary responsibilities and of public trust in one area breeds rejection in others.

About all that one can say for sure in this area is that those who believe that labor unions can any longer be treated as private clubs and fraternal organizations have put their heads in the sand. The government's thumb has been put on the scales far too squarely to withdraw it now.

Whether Congress and the courts will ultimately treat labor organizations entirely as public bodies subject to all the requirements of due process placed upon the federal and the state governments remains to be seen. But there can be little doubt that the trend is in that direction and that some approximation of this result is not unlikely. Possibly, the determining factor in how far Congress and the courts will go will be labor's own acceptance or rejection of its responsibilities.

All those participating in this conference, I am sure, hope that the labor unions will accept their public trust and apply the principles of due process to their actions without more exacting judicial or legislative intervention. A good place to begin, one might suggest, would be in the areas of denial of union membership and of other union rights discussed here. The obvious fairness, for example, of substantially universal union membership has much to commend it; public review boards can bring new protective forces into union operations; fair treatment for union officers and employees under suspicion can generate fair play in other areas.

The union movement has brought economic democracy to the twentieth century by furthering the equality of labor and management. It has helped bring justice by balancing the strength of these opposing forces. The problem now is to strengthen democracy within the unions themselves. I believe we have seen here some good places to start. **[The End]**

[*See page 892 for a comment on Mr. Rauh's paper by Lester Asher.*—Ed.]

A Legislative Program

By GERARD D. REILLY

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THIS SCHOLARLY symposium, in which so many well-informed and distinguished speakers have participated, has brought home to all of us the compelling need for the application of fiduciary standards in the field of labor relations. It was an unfortunate accident of history that the importance of this principle was not recognized at a much earlier date.

More than 22 years have elapsed since the passage of the National Labor Relations Act—a statute which gave labor organizations which represented a majority of employees in a given unit the status of exclusive bargaining representatives in dealing with the employers of the workers they represented. Obviously, this created a fiduciary relationship between the employees and the certified union—that of principal and agent —and an arm's-length relationship between the unions and management.

In my opinion, the remedial legislation called for by the revelations of the McClellan Committee and the subcommittees investigating welfare funds should have two objectives: The first is a statute requiring compliance by union officials with the standards the law imposes generally upon fiduciaries, that is, the rules which courts of equity and legislative bodies have developed for corporate trustees, partnerships and brokers. Such a statute should prohibit employers from encouraging or inducing these officials to violate such standards. The second is to confine labor unions to the performance of the fiduciary function vested in them by the designation of the workers, namely, the function of acting as the collective agent of the employees with respect to wages and working conditions.

Since your committee has entrusted to me the honor of discussing the legislative program, I should state candidly that my suggestions are based on a certain bias, a belief that no private organization or federation of private organizations, should be permitted to become so strong that their operations jeopardize the continuance of the capitalistic system or, as some would call it, the free-market economy, without which the freedoms and rights written into our political system are meaningless.

One of the most difficult problems which confronts any modern industrial society is the achievement of a proper balance in the area in which there is a real or imagined conflict between the interests of employers and employees. Since 1930, our most thoughtful law-making body, the Congress of the United States, has made several attempts to preserve this balance of power. In my opinion, an appraisal of these legislative efforts in the light of history provides some guides to the course which should now be charted.

As a result of the rapid development in the 1920's of mass production industry, accompanied by a wave of corporate mergers, Congress in the early thirties concluded that a sad imbalance existed. One of the things blamed for the inability of labor organizations to redress this imbalance was the ready availability to employers of injunctions in labor disputes. Congress sought to remedy this situation by passing the Norris-LaGuardia Act of 1932, an example followed by many states. We now know that this legislation went much too far, for instead of being limited to the real abuse—the issuance of temporary restraining orders on ex-parte showings by employers—it rendered labor unions immune from judicial restraints over such conduct as strikes in breach of contract, picketing for unlawful objectives, featherbedding, secondary boycotts and even violence, unless the local authorities were willing to concede they were unable to cope with the situation.

Before the impact of this legislation could be measured, Congress gave affirmative encouragement to unionization of workers in a series of enactments commencing with Sec-

tion 7(a) of the National Industrial Recovery Act and culminating in the Wagner Act. The primary object of this legislation was to restore the balance of power by prohibiting employers from using their powers of hiring and firing to discourage or encourage unionism or to interfere in the selection of bargaining representatives. Had the legislation stopped there, there could have been little quarrel with it, for it left to the workers the power to avoid the paternalism of either union or employer, by protecting their freedom of choice. But the act went further. It gave the majority union representative authority to act for all the workers in the unit without imposing any safeguards to insure that this authority would be exercised in accordance with fiduciary standards. It also contained a provision which partially nullified its basic objective. This was the provision which voided the prohibitions against employer discrimination and employer assistance to labor organizations if a compulsory union membership agreement was signed.

Under the agreements of the Wagner and Norris-LaGuardia Acts, labor organizations mushroomed and the "equality of bargaining" power Congress envisaged was rapidly attained. It was not until the war, however, that it became apparent that the one-sided character of these enactments had swung the balance of power dangerously in the other direction. By the device of the closed shop and the work permit, craft unions in the construction and shipbuilding industries were able to exact millions of dollars from the thousands of new workers who never had had an opportunity to vote in Board elections. In factory industry, where contracts containing compulsory membership on checkoff clauses were extremely rare before the war, the newer unions obtained enormous power over the workers they supposedly represented by a series of War Labor Board awards granting what was euphemistically called "union security." Operating in a legal setting in which they were immune from governmental restraints or any effective control by their rank-and-file members, the union managers apparently had the power to dominate the economy.

Aghast at the monster it had created, Congress perceived—in the prophetic words of Brandeis—that what it had accomplished was to deliver workers from the tyranny of employers to the tyranny of employees. The main thrust of the Taft-Hartley Act was an attempt to remedy this situation by making unions the agents, rather than the masters, of the workers. Thus, the new act included provisions permitting rank-and-file workers to file election petitions limiting the scope of the checkoff, imposing safeguards on welfare funds, requiring financial reports and eliminating union membership as a condition precedent to obtaining a job. The implication of these provisions—namely, that the interests of the worker and the interests of the union official were not necessarily one and the same—was the real source of the resentment of the top leadership of organized labor to the legislation.

In the hands of an unsympathetic administration most of these reforms became a dead letter. It has been made clearly evident not only by the investigation of the McClellan Committee, but by the conduct brought to light by the various legislative hearings on welfare funds, as well as the disclosures of the New York waterfront commission, that the principle that labor unions are the fiduciary agents of employees has not yet gained general acceptance.

Notwithstanding this fact, many defenders of organized labor have questioned the desirability of any legislation, except possibly in the limited field of welfare-fund administration. It has been pointed out that the AFL-CIO council has adopted a code of ethical practices which recognizes the standards demanded of a fiduciary and has even gone so far as to expel or threaten to expel unions which violate the code.

Necessity of Legislation

The efforts of the council to clean house, as it is popularly expressed, certainly deserve encouragement, but there is no sound basis, I submit, for assuming that these efforts are substitutes for legislation. For one thing, the larger unions in the AFL-CIO are much more powerful than that federation itself. Hence the possibility of expulsion is not a serious deterrent to misconduct.

The ouster of Harry Bridges' union from the CIO as Communist dominated does not seem to have disturbed its iron grip upon the dock workers of the West Coast. Nor has the secession of John Lewis' United Mine Workers cost his organization any loss of power over the miners or the coal industry. In many respects, the ability of the AFL-CIO to discipline its members is no greater than that of a trade association. If it were, the delegates to the Teamsters' convention would not have been so willing to elevate Jimmy Hoffa to their highest post.

Therefore, while I do not distrust the good faith of George Meany, I feel that his council will be ineffective in eradicating corruption in the powerful unions.

Even more important, the program of the council is a limited one. It is directed at preventing union officials from using union money to enrich themselves. But the diversion of union funds to race horses, profitable sidelines or luxurious living is only one aspect of a betrayal of the fiduciary duty. The union leader who uses the union treasury to put his puppets into legislative or judicial office or to support strikes or causes designed only to further his own political power is equally guilty. The code of ethical practices is silent in this respect.

Let us now review some of the specific legislative proposals which are either pending in Congress or have received a fair amount of public consideration.

Welfare and Pension Funds

Although the McClellan Committee itself has not focused its attention on welfare funds, the hearings of subcommittees of the House and Senate for the last three years have shown the need of additional regulation in this sphere. The latest proposal in this area, which apparently has the prestige of the endorsement of a majority of the Kennedy Subcommittee, is S. 2888, which was introduced at the close of the session by Senator Douglas, along with Senators Kennedy, Ives, Murray and McNamara. As the names of the cosponsors indicate, this bill, a revision of last year's Ives and Douglas bills, reflects primarily the concessions the AFL-CIO are prepared to make. Certain amendments to the earlier drafts, however, recognize some of the able observations of Professor Meltzer, who appeared before the committee.

Briefly summarized, the bill requires all administrators of welfare or pension plans to register their respective plans with the Department of Labor. An annual report showing receipts, expenditures and assets held is then required to be filed with the Secretary, who is directed to make copies of these reports and the registrations available for examination in the public documents room in the Department. The only exemption, other than fraternal organizations, of any note is the exclusion from the reporting requirements of plans affecting less than 100 employees. There is no provision that the Department of Labor should audit the reports, although there is a requirement that a licensed public accountant shall certify the reports unless the administrator is a bank or an insurance company whose records are subject to audit by state or federal agencies. False entries made for the purpose of defrauding beneficiaries, embezzlements, and kickbacks, are made criminal offenses.

Like the earlier Ives and Douglas bills, the new draft is encountering opposition both from industry and from banks and insurance companies because of its all-inclusive character, the point being made that only in the field of the jointly administered funds has there been evidence of corruption or flagrant disregard of trustee standards. Some companies, however—General Electric being a notable example—apparently feel that, as a matter of public relations, even plans wholly administered by employers should not seek exemption.

There is great danger that the very mass of paper which will come to the Department —it is estimated that there are between 250,000 and 500,000 plans with receipts running at the rate of 5 to 7 billion dollars in this country—will smother any effective enforcement of the proposed act. Certainly, it would seem wise to have at least two major exemptions: (1) plans negotiated by employers with insurance companies, in which the employer has no financial interest, which are reputable group insurance carriers and (2) plans which do not require the creation of any fund but which represent merely contractual obligations of employers to pay a stipulated scale of benefits.

It is true that because of such contingent liabilities many employers create reserve funds to meet them. But this should not cause Congress to treat such reserves as trust funds, for the obligation to pay benefits is basically no different from the obligation to pay wages. In other words, the relationship of the employer to the employee with respect to benefits, as well as wages, is that of creditor and debtor, and should not be regarded as that of trustee and *cestui* unless the plan is partly financed by employee contributions.

Another obvious defect in the bill is that it vests administration of the act in the Department of Labor, which historically has been open to all kinds of pressures from organized labor, instead of in the Securities and Exchange Commission, as the Douglas bill originally proposed.

Wholly apart from these refinements, however, there is a serious question as to whether

the public interest does not require legislation which goes further than seeking to eliminate the grosser types of dishonesty in the administration of welfare funds. Labor organizations, by their very nature, do not develop the kind of personnel who are equipped to deal with investment and actuarial problems. As long as labor organizations are permitted to have a voice in the placing of investments, the temptation to use these funds for purposes wholly unrelated to increasing the revenues or securities of the fund will always exist. There can be little doubt that one of the motivating factors which cause labor organizations to emphasize the inclusion of pensions in collective bargaining contracts is the expectation that the union will control the fund.

In my opinion, the interest of the rank and file would be greatly promoted by legislation which would confine the scope of collective bargaining on pension and welfare plans to the level of benefits and deny to the bargaining agent any participation in the administration.

Disclosure of Union Funds

Despite the exposures by the McClellan Committee of the widespread tendency of even the highest officials in such major unions as the Teamsters, Bakers and Textile Workers Unions to regard the money in union treasuries as something they can spend and invest as if it were their own, there has been little attempt thus far by any of the standing committees of Congress to formulate remedial legislation.

The Taft-Hartley Act, it is true, does require unions to file annual financial reports with the Department of Labor as a prerequisite to invoking the jurisdiction of the National Labor Relations Board. This provision has been rendered virtually meaningless by regulations adopted in the Schwellenbach era which prevent these reports being made public and by accepting as proper reports short forms which reveal little or no significant detail on actual expenditures.

A minor bill, recommended by Secretary of Labor Mitchell, which passed the Senate with the blessing of Senator McClellan and the standing committee on labor would merely direct the Secretary to make such reports public. The Taft-Hartley Act itself, as the chairman of the House labor committee pointed out, gives the Secretary full authority to do this if he wishes. It is obvious that the very minimum that is called for is legislation applying to all union funds those provisions with respect to registration, reporting and disclosure, together with the penalties for misuse, which the Douglas-Kennedy bill envisages for welfare and pension funds.

Secondary Boycotts

One of the worst abuses upon which revelations of the McClellan Committee have thrown the spotlight is the continued use by labor organizations of the secondary boycott as an organizing device. Time after time it has been shown that the contracts which racketeering locals of the Teamsters have imposed upon reluctant employers and equally reluctant employees have been due to the ability of their organizers to force almost any small employer to capitulate by shutting off the delivery and pickup of commodities. This is accomplished by directing members of the Teamsters Union to refuse to cross picket lines or, in the case of nonunion trucking operators, to interline freight destined for carriage on a carrier designated as "unfair."

This practice has become so widespread that, recently, an examiner for the Interstate Commerce Commission refused to grant applications for certificates to a group of nonunion carriers on the ground that the connecting carrier, being unionized, would not interline cargo with them. Obviously, such practices conflict with the most fundamental policy of the Labor Relations Act: the right of employees—rather than their employer—to decide whether or not they want to have a bargaining representative.

However, despite the sweeping prohibition of the secondary boycott by the Taft-Hartley Act, the Board, under the preceding administration, developed a number of ingenious rulings as an excuse for deciding the act did not mean what it said. Among the most notorious of these holdings were the validation of struck-work and hot-cargo clauses and the doctrine that if picketing were done at the primary or roving situs, the secondary boycott motivation for the pickets would be overlooked.

The present Board has overruled only a limited number of these holdings, those particularly relating to hot cargo. The unions are challenging the latest decisions in the courts. The insistence of some unions upon struck-work and hot-cargo clauses collides not only with the basic objectives of the Labor Relations Act, but also with fiduciary standards. Obviously, it is not in the interest of employees of a secondary em-

ployer who are represented by the union to impair their own livelihood by yielding to union instructions to refuse to handle goods which come to their own employer for carriage or processing.

A bill introduced by Senator Curtis earlier in the session would plug the loopholes which have permitted secondary boycotts and recognition picketing to persist. Certainly, the disclosures of the McClellan Committee have emphasized the need for its passage.

Compulsory Membership Contracts

I come now to one of the most sensitive issues in this field: the question of whether any real program of legislative reform should not eliminate from the Taft-Hartley Act the proviso permitting compulsory membership contracts. As I have previously said, this proviso was always an incongruous aspect of the original Labor Relations Act, for it did violence to the hands-off or neutrality policy which that statute directed employers to follow. The changes made in this proviso in 1947 represented a compromise between those who recognize this fact and the traditionalists. In the meantime, some 18 states, by passing right-to-work laws, have tried to make such contracts inoperative within their respective jurisdictions.

Public-opinion polls indicate that a substantial majority of people would like to see Congress also abolish compulsory membership contracts. Yet a number of influential spokesmen, including Senator Kennedy and Secretary of Labor Mitchell, have contended that it would pervert the whole purpose of the McClellan investigations if antiunion forces take advantage of the popular abhorrence of union wrongdoing to enact such "punitive" legislation. The proposition that a statute forbidding employers to discriminate either in favor of, or against, unionism is antiunion is one which should bear examination.

One of the most startling revelations of the Senate hearings has been the extent to which racketeers, after acquiring a control of local charters, have been able to sign compulsory membership contracts with numerous small employers without ever consulting the wishes of the workers. Their success as persuaders has apparently not depended entirely on resort to threats of violence, but to a selling job. The employers have been told that signing these contracts will not cost them anything because no attempt will be made to force wages up. The employer has simply to agree to deduct dues and initiation fees from whatever wages he is paying and the union will be satisfied. Then, under the contract-bar doctrine of the Board, it would be impossible for a more militant union—that is, one more interested in increasing the workers' compensation—to move in.

Thus the mere fact that the present federal law tolerates both the union shop and the checkoff makes the control of any labor organization which can raise money in this painless manner a tempting prize. Certainly, the withdrawal of this tolerance would not destroy any unions which command the respect and confidence of the workers they are supposed to represent, for, as I have already pointed out, the great bulk of union contracts—until the war—contained no such provisions. Such legislation would remove the tendency of even respectable unions to disregard fiduciary standards, for in almost every bargaining negotiation the union representative is willing to sacrifice a proposed concession to the workers if the other side of the bargaining table is willing to grant the union a compulsory-membership clause.

Other Legislative Proposals

There have been other suggestions for legislation which I shall refer to but briefly. One, which was referred to by Senator Kennedy in an interview with the labor press, would improve guarantees of union democracy. A similar proposal, it will be recalled, was included in the House version of the Taft-Hartley Act. It provided for notice being given of union meetings, secret ballots on various issues, and certain procedural safeguards with respect to the imposition of union penalties on members. Senator Taft and his colleagues rejected this proposal in conference as not only being impractical, but unnecessary so long as a union was prevented from retaliating against an employee's job security or his prospects of promotion. I think that this decision was a wise one, for I do not believe that improvements in internal union procedure will bring about any significant increase in rank-and-file participation.

Another would prohibit a union from using dues collected under a compulsory membership contract for political contributions or expenditure. The actual pending of bills to stop such practices is an indication of how laxly the criminal provisions of the Taft-Hartley Act are enforced. Unions, like corporations, are expressly forbidden from using their funds to help candidates in fed-

eral elections irrespective of the source of the funds. What is really needed is a concerted effort by the Department of Justice to enforce the law.

Proposals to prevent violence in labor disputes also are receiving serious consideration. There is no doubt that one of the most valid criticisms of organized labor is the willingness of union officials to resort to terrorism in strikes if any serious back-to-work movement develops. Even the most enlightened union leaders will privately admit they think union workers who beat up nonstrikers are fully justified. There is, however, sufficient law, both federal and state, to protect nonstrikers from violence. Lack of conscientious law enforcement is responsible for existing conditions.

Conclusion

In outlining the legislative proposals which I believe should have priority, I have referred entirely to Congressional action and not to state legislatures. I did so because I believe that defects in present federal enactments have created a national problem and that corrective action by Congress is therefore desirable. I do not mean to imply, however, that state legislatures should not also act. Unfortunately their only clearly defined power is with regard to right-to-work laws, but as I have always felt that the Supreme Court erred in holding that the Taft-Hartley Act was intended to pre-empt the field, I trust that Congress will eventually abolish the extreme judicial approach to the pre-emption doctrine.

[The End]

Comment on the Gregory Paper

By GEORGE B. CHRISTENSEN

The author is a member of Winston, Strawn, Smith & Patterson, Chicago.

IT IS ALWAYS a pleasure to hear Professor Gregory, and it is always difficult to comment adversely, if one wishes to, on what he has said, because he is so extremely plausible.

There was one topic that Professor Gregory omitted, not by oversight I am sure, but because he apparently wished to devote his attention to more abstruse questions. I would like to touch on it for just a minute because I think it is a matter of very grave concern, and I don't see where else it is going to be covered in today's program. That is the problem of the venal labor negotiator, the dispenser of "sweetheart" or illicit industrial love contracts—the man who is for sale for this, that or the other consideration. Those people obviously violate fiduciary standards by any man's test. By common knowledge, these people are for sale for everything from cash on the barrelhead, grandiose Christmas presents, nonrepayable loans, fishing trips, all the way to tips on the stock market.

The common knowledge of people in industrial practice is that those things go on, although there's no thorough research on it that I know of. The current Congressional investigations are turning up some nauseating details and we may have more documentation in the near future than we have now. This ties in with two or three things I am going to suggest later that were touched upon by Professor Gregory.

As unions have become more powerful and have had more practically enforceable economic power, if not legal power, they have acquired greater balance of power with respect to the industrial manager. The corrupt or venal union official, the dispenser of "sweetheart" deals, has had more to sell or, if you want to put it more accurately, has had greater power to extort with, a power to work havoc as well as to do good —a power impossible, in many instances, to combat. The opportunities for selfish enrichment have simply been too great for some people to resist.

The problem is a very real one, because by no law that I know of, starting with Moses, have we ever been able to repeal the law of human cupidity. We are going to have it with us for a long time.

Now the problem I suggest is a more difficult problem to deal with than that of the man who misuses union money once it's in his hands—the man who appropriates union funds, or speculates with them, or who takes rake-offs on insurance contracts or other union business. In the latter type of case, you are dealing with dollars; if you dig hard enough and are diligent enough and too many records aren't burned up, you can at least find out how many dollars were involved. You can usually trace dollars if you will work at it hard enough.

The man who sells his people out is quite a different thing, because you are then dealing with an undefinable standard. Now, by no means are all preferential contracts, venal contracts or bad contracts. There are many valid reasons why one business should receive a softer contract than another one. That right to exercise discretion and judgment and to vary terms and conditions is one that must be preserved, looked at either from the interest of the working man or from the interest of the industrial employer.

I would think it impossible for human ingenuity to contrive or write a statute that would set up, in express language, a standard of a fair bargain that would state precisely how you tell when a man hasn't exercised fair judgment for the benefit of his people but has sold out and has, for purposes of private cupidity or extortion, not done a good job for his people. I don't know how you would draw such a law, but I want to suggest this, and this will tie in with something I am going to say in a moment with respect to some things that Professor Gregory touched on:

I think experience demonstrates—and I think the recent and pending Congressional investigations demonstrate very clearly—that this abuse and the worst cases of it are nearly always in situations in which there was a closed or union shop in the particular shop or generally prevalent in the industry, situations in which it was impossible, or extremely difficult, from a practical point of view, for the employee who had been sold down the river to get out of the union. By and large over any period of time, employees soon sense whether, in their particular situation, their officers have made a fair deal for them or have, to some degree, sold them out. So long as membership in the union is on a truly voluntary basis, the employee has a fairly effective remedy against this venality which exists, but which can't be practically defined. That remedy is simply to drop out of the union. Unless the corrupt business agent can hold the employees in his union in his power, his ability to abuse them or to abuse the business is greatly tempered.

Simply dropping out of the union, where it can be done, is far easier than getting another union to come in—if that can be done at all—to knock the incumbent union out. The latter is no easy task under the ridiculous and complicated rules that exist today. The NLRB has adorned the statute with more and more refinements.

The so-called escape periods that we have under union shop contracts today—"You gotta get the notice in by registered mail 20 days before or not less than 10 days before—or on the anniversary of the contract, etc., and this, that and the other thing"—are about as intelligent to the average working man, and to some of us who hold law degrees, as would be a handbook on how to construct an atomic-powered satellite. They just don't work and there is no real practical, effective way for people to get out of unions today no matter what you may have on paper with respect to a theoretical escape period. So, if I am correct in this analysis, I have suggested a strong reason for outlawing all forms of compulsory or monopoly unionism with respect to that problem.

Now, I turn from that to some of the things that Professor Gregory dwelt on. Much of what he said, as I understand the paper, deals with the problems of fair treatment of minority groups within bargaining units and, although he didn't touch upon it, deals by the same token with the problems of small units in a large international union or in one where there's an industry-wide setup. Those problems, as he pointed out, arise from the concept, never before existent but established by the Railway Labor Act and by the Wagner Act, that the majority representative speaks for, and binds, the entire unit and must be dealt with on that basis. Secondly, the problem inheres, it seems to me, in the growth of industrial units and the NLRB's power to create or to define them, wherein one union represents persons of great skill and productive value and others of less skill. The groups, although within the same union, have no real economic unity, and in fact are, in many respects, antagonistic to each other and competing with each other for a larger share of the fruits of production. It is the conflict of the skilled man against the unskilled man. The tendency always is, and inevitably will be, and the wage patterns of the last 10 to 15 years demonstrate it,

If we except the light and the air of heaven, no good thing has been or can be enjoyed by us without having first cost labor. And inasmuch as most good things are produced by labor, it follows that all such things of right belong to those whose labor has produced them. But it has so happened, in all the ages of the world, that some have labored, and others have without labor enjoyed a large proportion of the fruits. This is wrong, and should not continue. To secure to each laborer the whole product of his labor, or as nearly as possible, is a worthy object of any good government.

—Abraham Lincoln

to sink the entire matter down to the lowest common denominator, so that, by and large, the skilled man—the more productive man—is constantly being sacrificed for the larger number of persons who are not so industrious or talented or skilled.

That basic problem comes from this majority concept and while this country is founded upon, in part, the principle that the majority rules, in nearly every political concept, or corporate concept, we have always recognized that there is no tyranny greater than the tyranny of a mere, unrestrained majority—nothing more vicious or capricious. We have constantly striven to erect safeguards to protect minority groups. By and large, with respect to the labor movement, that has not been done.

As I understand Professor Gregory, he has accepted the so-called "free rider" argument and his proposal is—"Let's make them all pay, once a union is selected, make them all pay dues, initiation fees and assessments —contribute financial support, but you don't have to have real compulsory unions—don't make them join." I think that he has found a difficult proposition, and has split it down the middle. The remedy proposed is wholly ineffective because, when you force people to assume full financial responsibility, you have, for all practical purposes, given them every real burden of union membership; and you have created greater union power—the financial power and wherewithal to operate the union that they dislike and that may be oppressing them.

This is not the place to go through the whole "free rider" argument as opposed to the "right to work" argument, but, Professor Gregory said, "unions are tormented by the fact that many employees are free riders—people who benefit by union standards without paying initiation fees and dues. But no union would dream of bargaining out lower standards for such employees, even if they could lawfully do so. That would be tantamount to maintaining non-union working conditions alongside of higher union standards." Now, with all due respect to a learned friend, I suggest that there are many false assumptions and erroneous predicates in that argument. I will not concede these people are "free riders." How can you possibly say that a skilled mechanic who is getting $2 an hour and who is contributing greatly to the product, and in a given wage market should get a 25 cent an hour increase, is getting a free ride from a union that holds him down to a five cent general increase? It just isn't so.

And I will not concede that everyone in the union benefits by what the union does. Basically, of course, the fruits labor enjoys come from production, not from union mesmerism. The union may or may not benefit all employees; and I will not concede that they would not bargain out lower standards for nonmembers. Those are assumptions that are belied by the facts in many circumstances.

The previous speakers have discussed the union as some distinct entity floating around in the air by itself—it has some fiduciary obligations, they say, but its obligations as an agent are lost sight of. The concept of an agent that is supposed to be doing something for actual human beings, and to be controlled by them, has been lost. If you're going to give exclusive bargaining power, you've got to impose fiduciary duties on the holder of it. It asked for the burden; it wanted that power; and it cannot be heard to complain since it has precisely what it asked for. And, if it should be that the union would like to collect tribute from everyone, whether it is doing them good or not, but it can't collect; it's a very small price for it to pay.

In the presentation of grievances, I cannot get very sympathetic over a man that exercises a right to stay out of the union and then finds the union doesn't press his grievance with that militant vigor it shows for a dues-paying member. The man has made his choice. It is true that in one aspect a fiduciary duty has been violated—but there's got to be some give and take in these things. I think, if we want people

to have the right to stay out of unions and not to contribute to them, they must realize that they are not going to get the same service that the dues-paying member does. While you can find certain theoretical difficulties with that view, I don't think they are great and I don't see any particular serious injustice in it.

The larger problem is the one that was touched upon in the closing pages of Professor Gregory's paper—monopoly power. Professor Gregory says unions, by their nature, are monopolistic and they are a restraint on trade. That's quite obvious. The primary purpose of a union is for a bunch of people to band together and say: "We will withhold our services, we'll take them out of the commercial market and we'll offer them to you only on such and such terms." Now we recognize that a restraint on trade to that extent, or to some extent, is desirable, but there must be limits.

Professor Gregory says that, originally, he was opposed to applying the antitrust concept to unions, but that if this power grows maybe we will have to do it in the future. I think that he is being reluctantly led to that point which logic and experience compel us to come to. The time for that application has long since passed—the time is right now! The time should have been 1947, when Taft-Hartley was passed!

When the antitrust concept is applied to unions, many of these fiduciary problems which arise from an excess of power will disappear. The industry-wide strike, says Mr. Gregory, cannot be defended. Now what is the industry-wide strike and why did it come about? I think you have the answer to the basic problem. It came about simply because of this: We have permitted Mr. John L. Lewis, for example, for all practical purposes to organize and control every single coal miner in the United States of America. I may be stretching it a little bit, but not much. Or we have permitted Mr. Reuther to have control, and again there aren't many exceptions, of everybody engaged in the production of automobiles in the whole country. And Mr. Reuther confessed his realization of monopoly, or near monopoly, power a few weeks ago when he threatened to bestow, or to withhold, his favors to the auto manufacturers to make them uniformly reduce the price of cars by $100. Only a monopolist talks like that. And if he has, and I believe he has, the power to uniformly reduce the price of cars by $100, he has the power to raise those prices $100.

You can't get a ton of coal out of the ground without two things: One, you've got to own it; you've got to own some equipment, that's capital. Second, you've got to get the people to dig it, that's labor. You can't turn out an automobile—it doesn't make any difference whether it's a Chevrolet or Ford or Plymouth or Rambler, unless you own the factory and have the equipment and finances to get the work in progress, and unless you are able to get the people to work.

Now, on the one side of that equation we have always recognized, and we never should depart from it, that we aren't going to let any one man or group own all the coal or own all the automobile factories and shut production off or turn it on as you would a spigot. But we have reached a point where we say we will let labor, which is the other half of the equation, combine to the point where they can turn the thing on and off just like a spigot. Any amount of analysis leads you inevitably to that very simple and stark result. Experience has demonstrated that the uses and abuses of monopoly power are so various, human minds are so ingenious, that the only way you can control monopoly is to forbid it.

We have applied, with various degrees of success, the "rule of reason" against business organizations under the antitrust laws. Unless, and until, we do the same in the labor field, we are going to be in constant trouble.

Professor Simons of this school said, and it has never been said more succinctly or more effectively: "Monopoly power must be abused, it has no use save abuse." That was true when Professor Simons wrote it—it is true now. It is the existence of that monopoly power that leads to the most shocking of the fiduciary violations that we have been discussing this morning.

I therefore suggest that the only long-term answer to the problem we have been discussing is to go to the root of the problem and destroy the monopoly power—confine the restraint of trade within a rule of reason. That course would allow people to organize and have the benefits of organization but would not permit the organization to go to the extent of monopoly. Laboring men then could, to a measurable degree, protect themselves, and business could be restored to equality of bargaining power—an equality they do not possess now and have not possessed for some time. **[The End]**

Comment on the Williams Paper

By ROBERT TIEKEN

The author is United States Attorney for the Northern District of Illinois.

MR. WILLIAMS has explained the government's interest in welfare and pension plans involving union members. He has discussed some of the more common abuses of these plans which occur when dishonest union officials divert money therefrom for their own personal benefit.

Mr. Williams has suggested the consideration of legislation whereby the attorney general or a superintendent, similar to a superintentent of insurance under state insurance laws, would be empowered to make periodic inspections and given authority to enforce trust agreements involving employee beneficiaries where interstate commerce is affected.

As an example, in the administration of today's typical welfare fund trust, the employers and employees are equally represented in accordance with Section 302, and usually, but not always, an independent trustee is selected to break deadlocks. This trustee is quite often a professor or a public official.

The trustees as such have no *federal criminal* restrictions placed upon them, nor is any public disclosure of their action required.

It must be remembered that in some cases at least, the employer trustees are in a position to be harassed by unscrupulous employee trustees in the employer's individual business. Accordingly, they are prone, or at least susceptible, to allowing the employee or union trustees a free hand in the administration of the established trust and are less likely to exercise their independent judgment. This abdication of responsibility is found usually where the employer has paid money into the fund and has deducted the payments as a business expense and, therefore, has no direct financial or pecuniary interest in the fund.

The neutral trustee is often a man of high moral principle and background but without any practical business experience or financial administrative experience.

The union or employee trustees, on the other hand, while they may have only the benefit of their members at heart, often have little or no financial administrative experience and lack the know-how of administration of such huge funds. With such situations as these, coupled with the lack of statutory standards and control and together with the opportunity provided for personal self-enrichment, the most amazing thing about welfare fund abuses is that they are not more prevalent. As long as there exists an opportunity for those with larceny in their hearts to divert welfare funds at the expense of the beneficiaries of the trust, there must be some method or methods of policing the administration of these funds.

Mere disclosure is not enough! One of the ways that local unions provide their members with the annual financial statement of the local as provided for by NLRB regulations is by posting a copy of the annual financial statement in a prominent place at the local's headquarters. We have had members complain to us that although the union has posted their annual financial statement on the bulletin board, the members are afraid to look at it or examine it for fear of some type of reprisal by union officials.

The fiduciary responsibility of management or labor to jointly administer these welfare funds for the benefit of the members should be aided and implemented by legislation providing for full and complete disclosure of the income of the fund; salaries of the trustees, administrators and officers; outstanding loans and commissions; and disclosure of the investment of the principal. This information together with criminal sanctions imposed for embezzlement, diversion and breach of fiduciary duty in the administration of welfare funds is necessary to adequately protect the beneficiaries thereof.

It is my opinion that the enactment of a few safeguards is necessary for the pro-

tection of the beneficiaries' welfare and pension trusts.

(1) The investments of the principal of the fund should be limited to those types of investments allowed in the investment of private trust funds.

(2) Full annual financial reports prepared by independent auditors setting forth in detail the income investments and expenditures of the fund should be furnished each year to the beneficiaries.

(3) Criminal penalties should be imposed for diversion of funds, for any personal use of the funds by any of the trustees or administrators, and for breach of fiduciary duty of the administration of the funds.

(4) An agency of the state, or of the federal government in the case of industry affecting interstate commerce, should be empowered to examine the books and records of the fund and to report the results of its examination to the attorney general of the state or to the United States attorney, as the case may be. This power of examination should be similar to that given to bank examiners.

(5) The attorney general of the state or the United States attorney should be given the power to enjoin the apparent violation of the safeguards imposed, as well as the duty to bring criminal actions for violations.

[The End]

Comment on the Rauh Paper

By LESTER ASHER

The author is a member of the firm of Asher, Gubbins & Segall, Chicago.

A VERY excellent paper by Professor Dunlop of Harvard, delivered earlier this year, emphasized many of the inconsistencies and contradictions in this labor-management field. In connection with the problem of expulsions and denials of membership, we have to realize that all of our adoration of the rank and file and our urging of democracy within labor unions is in this field entirely contradicted by the fact that in most cases of discrimination because of race or color, the rank and file is unanimously in favor of such discriminatory objectives. So here we have an area where our worship of the rank and file has to be tempered by what we think is the proper public policy.

I go along completely with Mr. Rauh that there should be no discrimination in any labor union because of color or race. However, I cannot agree with the arguments on which he bases this conclusion. I believe, first of all, that the labor movement has done a better job with respect to getting away from discrimination because of color or race than has our general community about us. Certainly in this area of discrimination, I think labor unions are farther ahead than are hospitals, public utilities, landlords and many other members of our general society. What I disagree with in Rauh's analysis is that he places his emphasis in opposing discrimination because of race or color on the argument that no collective bargaining agent can possibly accord equal treatment to nonmembers in the everyday activities of the union. If carried to a logical conclusion, that would mean that a union cannot exclude a member or refuse to accept him as a member because it found that he was a strike-breaker or a noncitizen, because he refuses to take an oath or attend the first meeting and be sworn in, or because, as in some unions that I am familiar with, he was previously a Pinkerton detective or a spy. It seems to me that if you urge the theory that no exclusive collective bargaining agent can possibly do a good job for a nonmember, then you would have to hold that the failure by a union to grant membership for any reason whatsoever is invalid and discriminatory.

I agree wholeheartedly that there should be no discrimination on the part of a union because of race or color. But I believe that our whole collective bargaining system would be much better off if *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*, 33 LABOR CASES ¶ 70,992 (CA-6), that is now

pending in the Supreme Court were decided by the Court on the theory that our public policy is opposed to discrimination because of race or color. I want the Supreme Court to decide the case entirely on that ground alone and not on the argument that a sole collective bargaining agent cannot possibly represent a nonmember. I urge that unions should have an absolute right to choose their membership, except for discriminatory consideration such as race or color which are against our public policy. Unions should, however, be able to attach other conditions to membership and should retain as much of the fraternalism and the old ideals of a lodge as they desire. If unions today were more conscious of those old ideals of fraternalism, they would be doing a better job.

Last, in pointing out some of the inconsistencies and contradictions in this labor field, I must emphasize that at the same time as we are talking of greater democracy in unions and of giving the rank and file more participation, we are forgetting one of the important facts which Professor Summers, of Yale, mentioned in an article he wrote in 1951. He said: "The need for democracy within a particular union is somewhat tempered by the existence of competing unions. If members are not free to correct the policies of their union from within, they can revolt and overthrow it in a board election." Summers goes on to point out how important is this right of revolution, the right of a member to go to another union. He emphasizes that "The presence of a competing union not only reduces the need for internal democracy, but tends to encourage internal democracy."

It seems curious to me that even someone who is as zealous about civil liberties as is Mr. Rauh is still overcome by the current feeling that the greatest thing the labor movement can achieve at this time is unity, unity and more unity. We are forgetting that this desire for unity may also be contrary to and inconsistent with our attitudes concerning civil liberties and democracy. Part of the problem which the AFL-CIO has gotten into is illustrated by the question of taking the Fifth Amendment. I read the AFL-CIO and UAW's first releases with respect to the Fifth Amendment just as did many other people and just as did Professor Dunlop. I think the AFL-CIO and the UAW said pretty flatly exactly what Mr. Rauh now contends they didn't say. But part of the trouble is that even in the high circles of top AFL-CIO echelons, there is at this point too much of a desire for unity and there is a resulting failure to speak out and to come to an exact understanding about what is really meant concerning some of these important issues.

I would suggest that even though many of us are not anxious to have happen what we are afraid we will see in the next few months, nevertheless, in many ways more conflict and more competition between labor unions, from the point of view of trade union democracy, may not be the worst possible thing. **[The End]**

STATEMENT REQUIRED BY THE ACT OF AUGUST 24, 1912, AS AMENDED BY THE ACTS OF MARCH 3, 1933, AND JULY 2, 1946 (Title 39, United States Code, Section 233) SHOWING THE OWNERSHIP, MANAGEMENT, AND CIRCULATION OF

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Henry L. Stewart
(Signature of editor, publisher, business manager, or owner)

Sworn to and subscribed before me this 27th day of September, 1957.

[Seal] Lester Johnson
(My commission expires Nov. 14, 1957)

Books . . . Articles

CURRENT LITERATURE

in the Labor Field

Gompers' Views on Unionism

Samuel Gompers — American Statesman. Florence Calvert Thorne. Philosophical Library, Inc., 15 East Fortieth Street, New York 16, New York. 1957. 174 pages. $3.75.

This book is a study of the life and doctrines of Samuel Gompers, a leader in the American labor movement for 60 years and one of the principal founders of the American Federation of Labor. The author knew Gompers personally, working with him for over 12 years as a confidential assistant. She attempts to show Gompers as an undeviatingly honest commander, bound to definite principles and holding steadfastly to them throughout his lifetime.

Especially interesting are these principles when viewed in the light of the present-day labor movement. One of Gompers' deepest convictions was the necessity for voluntarism in labor. At his last AFL-CIO convention in 1924 (he died that same year), he wrote: "Where we have blundered into trying to force a policy or a decision, even though wise and right, we have impeded, if not interrupted, the realization of our own aims." He repeatedly stressed that the union and its officials had no power to command anyone to do anything, and believed that "persons who benefit through rights must respect the rights of others."

A corollary to this belief, and appropriate today in the face of accusations that there is too much power in the hands of certain labor men, is another of his statements:

"There are people in the labor movement who seem to believe that success can only come by entrusting great, yes, absolute power in the hands of an individual or an executive officer. I warn you against a calamity none greater than which can occur to the labor movement . . . . The man who would arrogate to himself in the labor movement absolute and autocratic power would be a tyrant under other circumstances and has no place in the labor movement."

Gompers opposed any legislation which made arbitration compulsory. He maintained that arbitration was beneficial only when voluntary and entered into by two equals, with equivalent powers to inflict injury and to defend themselves. He was similarly opposed to required delays in strikes until after disinterested inquiry has been made, and asserted that the public was *not* disinterested in strike issues and had no right to conduct compulsory public fact-finding sessions before a strike could take place.

One of the most telling aspects of Gompers' life was his unflagging fight against socialism. At the AFL-CIO convention in 1903, he blasted the socialistic elements attempting infiltration into the union with these words:

"Economically, you are unsound; socially, you are wrong; industrially, you are an impossibility."

The socialists believed that there was an inevitable, irrevocable gap between the interests of labor and the interests of the employer and saw every relationship between the two as a bitter fight in which labor must not budge an inch. Gompers, on the other hand, held that only through intelligent understanding of each other's problems could anything worth while be accomplished for either side.

In addition to his stand against socialism, he was firmly opposed to any political affiliations for unionism. He based the labor movement on economic rather than political considerations; he stated that if a labor party were successful, it would be weakened from its original intent through the neces-

sary patronage and dictations of nonlabor interests.

Finally, with today's health and pension plans, it is especially informative to note Gompers' aversion to legislative health insurance. He believed that such insurance would regiment workers and undermine their independence by making them dependent on the government. In 1915, he warned:

"Doing for people what they can and ought to do for themselves is a dangerous experiment. In the last analysis the welfare of the workers depends upon their own initiative. Whatever is done under the guise of philanthropy or social morality which in any way lessens initiative is the greatest crime that can be committed against the toilers. Let social busy-bodies and professional 'public morals experts' in their fads reflect upon the perils they rashly invite under this pretense of social welfare."

Viewed in the perspective of the unions' present position, this book provides a good insight into the ideals which guided the founding of the modern labor movement and supplies a basis for thoughtful comparison with labor as it exists today.

Write Better

Written Communication in Business. Robert L. Shurter. McGraw-Hill Book Company, Inc., 330 West 42nd Street, New York, New York. 1957. 580 pages. $6.

Let's face it! People in business are reluctant to write. Any achievement through organization is dependent more and more upon written communication. This is a book on helpful hints not only on how to write better letters, but on how to write better communications regarding business problems, such as sales policy, disciplinary cases and other items.

A part of the book, printed on blue paper, is called the reference section and it is a review of the rules of parts of speech, the sentence, punctuation and other matters relating to syntax. It is a section which is always helpful to browse through.

ARTICLES

Automation . . . As automation becomes progressively more complex, are the traditional American values of individualism and decisional independence disappearing from our labor force?

If this is true, the trend will have far-reaching consequences, not only in a sociological but in an important economic sense. In a penetrating study, "The Meaning of Work in an Age of Automation," Bernard Karsh, assistant professor of sociology at the University of Illinois, has examined the indications within our economy that point toward this trend. The article originally appeared in *Current Economic Comment*, August, 1957.

What is happening to the American worker as technology advances and takes more and more of the individuality away from his job? Mr. Karsh believes he is being required to develop into a new kind of person, different from all others before him. Why is this change necessary? It is because the worker who has been accustomed to exercising even a minimum of control over his job must now "stand outside his work." He cannot stop the production process—usually, he cannot even alter it. In the modern machine-run operation, his position is one of dial- and gauge-checker. Mr. Karsh says that "muscular fatigue is replaced by mental tension, the interminable watching, the endless concentration."

But even this is not the final stage in this change required of workers. What is generally believed to be the greatest danger in automation—the single job, repeated over and over—is now applicable no longer in the modern automated process. The time-study man and the assembly-line repetition that goes with him are gone; or at least they will be gone in the future, as electronically operated machines take over the routine. But gauge-checking can be done by machines, too. What, then, is left for the worker?

Here Mr. Karsh makes his main point. The man who will be needed will be the man who can plan and co-ordinate—who can design, construct, repair and program the machine. But he must be the man who can, first of all, work with a *team*. He must have the ability to view the entire production process as a whole. It has been the custom of industry to think of production in terms of the "unit." The incentive wage plans and the many methods of measurement employed by most companies are based on this thinking. But the "unit of production" in the future will be the factory, not the individual or the machine he operates. The amount of production will no longer be an appropriate measurement. Instead, Mr. Karsh predicts, "Worth will be judged on the basis of organization and planning and

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the continuously smooth functioning of the operation."

This means the existence of two extreme types of jobs: for the technician who can also cooperate, a job of responsibility, requiring exacting qualifications; and at the other end of the scale, the few jobs that, as the author says, "may be too menial to automate." Mr. Karsh sees this future system as an opportunity for the worker to regain some of the status he lost when he was forced to abandon the role of the craftsman and "mechanize" his brain on an assembly line. "There may be in the making a reversal of the historic trend toward ever greater specialization of function with its trivialization of work, and the reintegration of labor may begin to emerge," he says.

But at what cost? In conclusion, the author has this to say about the age of automation:

"The individual worker loses his importance and is replaced by the team, and greater value is placed on the operating unit as a whole. [The man who is part of a group] . . . may indeed replace the traditional individualism which has characterized American society for so long."

Preventing Job Failures . . . Last month the LABOR LAW JOURNAL reprinted part of an article by Calvin L. McCoy entitled "Discipline, Discharge and Arbitration," dealing with the problem of what action an employer ought to take when an employee is not measuring up to his job.

In the *Personnel Journal* for November, 1957, Lawrence G. Lindahl also deals with this important question, but he enlarges on it by discussing the reasons that may be behind an employee's negligent behavior. In "How to Prevent Job Failures," Mr. Lindahl (of Lawrence G. Lindahl Associates and Rochester Counseling Clinic in Rochester, New York) asserts that job failures are the result of human failures, rather than of lack of employment skills. Almost 90 per cent of all discharges are because of behavior traits, he says.

Three major causes for job failure are carelessness, absenteeism and noncooperation. Mr. Lindahl states that these three qualities are due to a state of mind of the employee, and that the supervisor may alter the situation by trying to determine the causes for it. Carelessness, for example, can be overcome by putting the employee with a group of careful workers, with whom he must keep pace; or he can be placed on a job that is simple and repetitious, where there can be no chance of error through carelessness.

Absenteeism for reason other than illness is akin to carelessness. Both may be indications of immaturity, such as is embodied in a lack of a sense of responsibility. This can be due to several causes. If a worker does not receive recognition for his work, his level of interest in his job may fall, and he may become habitually absent. A good supervisor can detect signs of this and take steps to remedy the situation.

The final cause for job failures is noncooperation. The author frequently regards this in the same light as carelessness and absenteeism—a product of an immature state of mind. Major reasons for it can be "an inferior feeling on the job, . . . jealousy, boredom of work below the ability of the worker, fear, quarrelsomeness, and stubbornness." Or it can be brought about by certain actions on the part of the employer: ". . . broken promises, lack of recognition, giving conflicting orders, bad working conditions, assigning work beneath employee's capacity, fancied grievances based on misunderstanding, disturbing rumors or gossip, duplication of effort, excessive use of discipline or nagging, affording no opportunity to exercise initiative, and poor planning and scheduling."

Some of Mr. Lindahl's suggestions for remedying these problems include giving credit where it is due, trying to give the employee a job commensurate with his interests and abilities, helping when help is needed and demonstrating an interest and understanding in the welfare of the workers.

Arbitration

Decisions • • •

Developments

Court Cannot Interfere with Method of Selecting Arbitrator

A court may not interfere with the contracted method for selecting an arbitrator. This is the substance of a recent holding of the New York Supreme Court (*In re Newport Hosiery Stores (Harlem Labor Union, Incorporated)*, 33 LABOR CASES ¶ 71,027).

The facts showed that the arbitration provision of a union contract provided that the arbitrator shall be selected by the state mediation board. One of the parties requested that arbitration be stayed and that an arbitration panel be selected by the court rather than by that board. The court said that since the arbitration provision clearly designated the state mediation board as the arbitrator, the court had no basis for stepping into the picture.

Persons Without Employee Status Not Entitled to Arbitration

Individuals who do not have the status of employees cannot compel arbitration under an arbitration agreement, the New York Supreme Court recently declared (*Matter of New York Mirror (Potoker)*, 33 LABOR CASES ¶ 71,028).

The evidence showed that certain freelance photographers had a dispute with a newspaper which purchased their pictures. The union contract of the newspaper publisher required that "all grievances arising from the application of this agreement" shall be submitted to arbitration. However, specifically excluded from coverage were "contributors on a free lance basis whose products, such as . . . photographs are purchased by the publishers."

The court held that the alleged dispute did not present an arbitrable issue. It noted that the question of whether a dispute comes within the scope of an arbitration agreement is a question of law for the court to determine. A party's mere assertion of a meaning contrary to the plain import of a contractual provision does not create an arbitrable issue. The court quoted from *Matter of International Association of Machinists*, 12 LABOR CASES ¶ 63,574, aff'd, 13 LABOR CASES ¶ 63,931.

The motion to stay arbitration in the instant case was granted.

Supervisors Not Covered by Arbitration Clause

Where a union contract specifically excluded supervisory employees from its coverage, no arbitrable issues were raised by the employer's refusal to restore a former supervisor to his old job and the union's demand that a negotiated wage increase be extended to supervisors. A superior court in the State of California found that the employer did not fail to comply with the terms of the collective bargaining agreement since supervisors were specifically excluded from the coverage of the contract and, thus, were not entitled to any wage increase by reason of an amendment to the contract. The former supervisor was employed for a number of years as a division manager by the employer. In 1956 he suffered a disability, and when he returned to work, he was employed as a clerk. He then requested that his employer restore him to his former supervisory position. The employer refused to return his former job to him. In the court's view, the position in controversy was supervisory within the meaning of the LMRA and, as such, under the terms of the collective agreement which excluded supervisory personnel, no arbitrable issue was raised by the employee's request to be reinstated to his former position.—*Lathen v. Sears, Roebuck & Company*, 33 LABOR CASES ¶ 71,078.

Wages . . . Hours

Rulings

Decisions

Problems

Toll Road Construction Covered by FLSA

Where a new toll road under construction was an extension of the existing system of interstate highways the Fair Labor Standards Act was held to cover such construction. This decision, reached by a federal district court in Texas, resulted in an award of statutory minimum wages and overtime pay for night watchmen employed on the toll road project. The toll road had many interconnections with interstate highways and as such, the court construed the project to be part of interstate commerce thereby placing the project under the requirements of the FLSA. In the court's view, coverage of the project by the FLSA was dependent upon the fact of the project being an extension of existing facilities for interstate commerce. Since the toll road was to be connected with a number of existing interstate highways, and its main purpose was to relieve congestion on existing highways, the court found the project itself to be part of interstate commerce. As such the employees working on the toll road were covered by the provisions of the FLSA regarding minimum wage and overtime pay.—*Mitchell v. Moorman*, 33 Labor Cases ¶ 71,024.

Traveling Auditors Entitled to FLSA Benefits

Traveling auditors of a retail chain who worked in two states were held to be entitled to the minimum-wage and overtime-pay benefits of the Fair Labor Standards Act. In announcing this rule the court of appeals reversed the decision of the trial court which had refused to issue an injunction sought by the Secretary of Labor to restrain violations of the act. The auditors employed by the chain lived in Missouri and audited the operations of the chain in Missouri and Kansas. The appellate court in reaching its decision cited as a guide the Supreme Court decision of *Mitchell v. C. W. Vollmer & Company*, 28 Labor Cases ¶ 69,243. In that case the Supreme Court stated that the act, and its definition of the term "commerce," should be liberally construed and that practical considerations rather than technical concepts should be controlling. Following this analysis the appellate court arrived at the conclusion that the auditors were engaged in commerce since the activities of the traveling auditors were as integral a part of the company's interstate functions as were those of the employees working physically in the accounting departments of the branch office. The appellate court also ruled that the auditors were not removed from coverage of the FLSA by the exemption provision on retail or service establishments. The auditors were not employed by the individual retail stores so as to be exempt from the statute under the retail-establishment exemption.—*Mitchell v. Kroger Company*, 33 Labor Cases ¶ 71,058.

Employee's Own Records Basis for Overtime Pay

Where an employer failed to keep records of his employee's overtime work, a court of appeals held that the employee's own records were a valid basis for his claim for overtime compensation under the federal wage law. A federal trial court had previously denied the overtime work payments on the grounds that the employee did not meet the burden of proof as to the amount and extent of the overtime work. (*Caldwell v. Mitchell*, 33 Labor Cases ¶ 71,066.) The court of appeals reversed the trial court in view of the fact that a reasonable approximation of overtime work was afforded by the employee's own records and recollections. In a suit for recovery of overtime

wages the employee has the burden of proving that he performed the work for which he seeks compensation. Where the evidence presented is sufficient to form a reasonable inference, the burden shifts to the employer. In the present case the employee introduced evidence in support of his claim, such as a daily record of overtime work which he kept himself. The appellate court stated that this evidence shifted the burden to the employer and the employer did not counter this evidence as he kept no records, nor did he have any recollections of the employee's overtime work. Solicitor Stuart Rothman, who handled this case for the government, stated that the decision is of practical value in its showing that overtime pay claims will not be defeated merely because the precise number of overtime hours worked cannot be proved.—*Caldwell v. Mitchell*, 33 LABOR CASES ¶ 71,067.

Allegation of Fraud Fails to Bar Overtime Pay Recovery

Where a former bookkeeper of a company obtained a judgment for overtime pay against the company, an appellate court would not vacate the judgment on the grounds of fraud. In this case, a former bookkeeper of a manufacturing company had obtained a judgment for $4,000 against the company for overtime pay under the Fair Labor Standards Act. After the judgment was entered, a minority stockholder of the company, who had been the past president of the company but had later been ousted and was also involved in other litigation against the company, intervened in the employee's suit and moved that the judgment be set aside. The minority stockholder contended that an attorney for the company had knowingly allowed an invalid overtime wage claim by the bookkeeper, and had refused to defend against that claim because he wished to reward the bookkeeper for siding with the company and attorney in that other litigation. The district court found no fraud or misrepresentation of the overtime pay claims. (See 28 LABOR CASES ¶ 69,442.) The appellate court found that the evidence supported the trial court's conclusion that the ex-president had not sustained the burden of proof on his charge of fraud. The evidence showed that the bookkeeper had worked overtime without compensation and that the amount of judgment had been arrived at by good-faith compromise. This was sufficient to permit the trial court to conclude that circumstantial evidence of fraud was overbalanced by the other evidence.—*Cuthill v. Ortman-Miller Machine Company*, 33 LABOR CASES ¶ 71,011.

Construction in Reactivation of Air Base Not Under FLSA

Construction work on new facilities for an air base did not come under the coverage of the Fair Labor Standards Act where the property had never been used as a commercial public airport and where its previous use as an air base had been abandoned for a long period prior to the new constuction. The district court held that workers on the construction project were not engaged in interstate commerce, so as to be entitled to overtime pay for overtime work.

The air base was established in Florida during World War II and was shut down in 1945 because of severe damage caused by a hurricane. In 1948 the government transferred ownership in the property to a local county government. Until 1953 the property was used for various purposes other than aviation. However, in 1953 the government reaquired the property and proceeded to build a new air base.

In denying the request by the Secretary of Labor for an injunction, the district court stated that the construction work did not constitute engagement in interstate commerce within the meaning of the FLSA, as it did not amount to repair, maintenance, reconditioning or extension of an existing facility for interstate commerce. The property had never been a private commercial airport, according to the court, and its use as an air base had been abandoned for a considerable length of time before the construction project began.—*Mitchell v. Empire Gas Engineering Company*, 33 LABOR CASES ¶ 71,013.

Truck Driver Within FLSA Exemption

A truck driver in the employ of a company engaged in interstate commerce came within the scope of the FLSA's Motor Carrier Act exemption and was not entitled to any overtime pay, regardless of the number of hours worked by him. He sued for minimum wages and overtime pay because he had to work an average of more than 118 hours a week to carry out his assignments. The district court granted the truck driver the unpaid amount of his statutory minimum wage, but would not allow recovery for overtime work since he came within the scope of the FLSA exemption.—*Hayes v. Tolbert*, 33 LABOR CASES ¶ 71,055.

Rank and File

News of Work and Working People

Meetings of Labor Men

American Management Association.—The American Management Association will hold a Special Conference on Supervision on December 2, 3 and 4 at the Drake Hotel in Chicago. Featured will be a panel session on coaching, with such well-known figures participating as Leo Durocher, now general program executive at the National Broadcasting Company. Also planned is a half-day session on arbitration, and panel discussions on the use of psychological tests, the supervisor's responsibility for cost reduction and allaying fears of automation.

Other meetings of the association include the following: January 6-8, a special conference by the packaging division, at the Commodore Hotel, New York, New York. Materials, methods, machines and markets for vacuum and skin-forming packages will be taken up. January 21-24, the annual West Coast General Management Conference will be held at the Fairmont Hotel in San Francisco. Retired businessmen will discuss leadership, manpower development and methods of choosing successors.

Cleveland Chamber of Commerce.—The Seventeenth Annual Northern Ohio Personnel & Executive Conference will be held January 30 and 31, 1958, at the Hotel Carter in Cleveland. It is sponsored by personnel and industrial relations groups affiliated with the Cleveland Chamber of Commerce. The conference theme is "Creative Thinking in Management—Challenge for '58."

Shortage of Scientists

Surveys show demand for technologists in America far exceeds supply.

A recent study has shown the tremendous lack in the United States of qualified scientists and technical men. The shortage, the survey finds, is increasing rather than decreasing.

Based on four areas—education, industry, government and community—the report demonstrates how vital the study of science is for the advancement of the nation, and yet how neglected is the scientist's role.

Understandably, the great stumbing block was found in American high school programs. Some of the disturbing statistics follow: Compared to the 100 per cent of Russian ten-year (high-school) graduates who take mathematics *through* trigonometry, only 37 per cent of American students even take geometry, and less than 65 per cent take algebra; every Russian student has four years of chemistry and five of physics, in comparison to the 32 per cent of Americans who take only one year of chemistry, and the 24 per cent who take physics.

The curriculum in America's high schools needs changing. Science not only is not stressed, it is in many cases ignored. Important, too, is the fact that very little is done to improve the quality of the education that is offered. A high percentage of students receive diplomas, but, in the words of Dr. B. R. Stanerson of the American Chemical Society, there is "the tendency to provide high school education for all with the unavoidable trend toward mediocrity."

Here are a few of the suggestions offered by the study: Improve the educational curriculum; encourage scientific study in young students; increase pay and opportunities for advancement for high school and college teachers; encourage industry to use their technical personnel more efficiently; have companies and associations provide financial aids to education; and request that the federal government supply tax deductions for educational contributions, and military-ex-

emption incentives for men engaged in important scientific work.

Another study pointed out a specific field in which America needs her scientists—engineering. The need for engineers during the seven-year period between 1950 and 1957 exceeded 46,000 a year; but according to the survey, the demand from 1957 to 1960 will be even greater. There were only 33,600 college graduates added to the field from 1950 to 1957; and although by 1960 the number will increase to 41,500 annually, the supply will still not equal the demand.

Especially important will be mechanical and electrical engineers who can work in the areas of electronics, missiles and rockets. Requirements for these men will continue to increase as industry in these fields expands.

Reduced Buying—Why?

Recent consumer buying shows a decrease. The meaning of this and some possibilities for the future are explored.

The sharp drop in buying within the last few months has caused considerable worry in many quarters. Several reasons have been advanced for the decrease—the uncertainty of the Middle East situation, Russia's unexpected jump toward technical know-how—but whatever the cause, the question most frequently heard now is, "Is this a harbinger of recession?"

Guaranty Survey, a monthly publication of the Guaranty Trust Company of New York, says no; or at least, it says the indications are too meager to definitely say yes. But *Economic Trends and Outlook*, published monthly by the AFL-CIO, says that "there are signs of danger ahead." It cites weakening markets and the leveling off of the capital-goods boom as two good indexes.

In addition, Dr. John H. Hoagland, of Michigan State University's department of general business, says "business conditions are not good," noting a decline in steel production, railroad carloadings and new orders for paperboard and machine tools. Another MSU man, however, Dr. John H. Hunter of the economics department, points out increases in the gross national product, the national income, personal income, disposable income and consumption expenditures, that may indicate a rise.

Both sides will be able to determine more accurately the entire situation within the next few months, by using several yardsticks recommended by *Guaranty Survey*. After the federal government's quarterly survey of equipment and plant spending plans has come out, two estimates of outlay will be included in it. These are usually interpreted as being good hints.

But the biggest area to watch will be the expenditure of American consumers. The past months showed a considerable drop. What will the future show? Some analysts believe the drop from normal buying only temporary; others say it may suggest something entirely different. These last assert that through fear of recession, consumer attitudes are undergoing a change. They say their purchasing will now follow new patterns.

All are agreed, however, that the one best way to settle the argument, and answer that vital question, is to study carefully the future buying records.

Latest Survey of Salaries

Analysis of salaries received by engineers, administrative employees and scientists shows increase.

Rates and ranges of pay for 33,797 employees engaged in 58 major engineering, scientific and administrative activities have just been studied by the American Management Association. It was shown that these employees' average salary level rose 2.7 per cent less than it had by the same time last year. The study indicated that administration salaries at all levels of management have become comparatively uniform.

The 263 companies studied, 17 of them located in Canada, showed a maximum percentage salary increase for quality-control engineers, who averaged 7.9 per cent in raises between June, 1956, and June, 1957. Electrical and mechanical engineers were increased by 7.5 per cent, and the smallest increase went to systems and procedures analysts, 3.8 per cent.

The range of median annual salaries for all engineers in every field was from $5,400, the lowest, to $13,100 at the top nonmanagement level. For certain types of engineering positions, some individual salaries ran to as much as $20,000 per year.

Corporate attorneys' salaries range from $6,300 to $16,500; staff accountants, internal auditors and systems analysts receive from $5,100 to $10,000 per year; and chemists', mathematicians' and physicists' median salaries range from $5,400 to $14,000 per year. Canadian salaries are generally lower

than those in the United States, with engineers receiving from $4,700 to $10,400—a difference of about $2,700 at the highest level.

More California Reports

More than half of union labor has pension plan coverage.

On the heels of a study (reported in the LABOR LAW JOURNAL last month) that showed 82 per cent of the union workers in California receiving paid vacations, the annual issue of *Union Labor in California* shows that over half of them are covered by pension plans, too. The survey reported that by June, 1957, at least 718,000 employees had pension provisions in their union-management-negotiated contracts—about 52 per cent of the total number.

For more than 86 per cent of these workers, the employer carries the full expense burden of the plan. For 52 per cent, the employer's contributions go into a pension trust fund which, except for one case, is administered by both union- and management-appointed trustees. For 49 per cent, the employer provides retirement benefits to the employees, rather than contributing monetarily to a trust fund.

California Governor Goodwin J. Knight also recently announced the formation of a seven-man advisory board which will safeguard labor welfare funds. The council will assist the state insurance commissioner in regulating and overseeing health and welfare insurance funds.

More Pensions for Over-65's

Older people are receiving more government pensions than ever before.

Even though there are not as many people over 65 at work today as there were at the end of World War II, older people are receiving substantially more income than they were then.

The National Industrial Conference Board reported that more than half of all of the 15 million over-65 members of the population are awarded pension payments. Pensions granted by the government include old age, survivors and disability insurance; railroad retirement; federal, state and local government retirement; and veterans' benefits.

Some interesting statistics came out. The proportion of older people receiving retirement funds, it was found, jumped from one fifth to more than three fifths between 1948 and 1957. This is in contrast with the drop of four percentage points experienced by most of the rest of the population—wage earners, their wives and those who receive public-assistance payments.

People who received income from sources other than those of employment, public assistance or government funds, as well as those who had no income at all, benefited the most from the increase. Their proportion diminished from 29 per cent to 5 per cent of the total older population.

Taft-Hartley Revision?

Much-discussed act still under fire from both labor and management.

The Taft-Hartley Act has received a great deal of criticism since its passage in 1947. Principally from labor leaders, the claim is often heard that the act is anti-labor and designed to weaken unions. Other claims come from management, which says that the act is not strong enough and contains "loopholes." A bill, known as S. 76 and calculated to close these "loopholes," is pending before Congress.

One of the chief areas of controversy between the two sides centers around the secondary boycott. As George Meany, president of the AFL-CIO, has put it:

"I think that . . . it is outrageous . . . to require union workers in one plant to handle struck work from another plant."

But business, speaking through Philip M. Talbott, president of the United States Chamber of Commerce, has stated:

"To put it bluntly, . . . we regard the secondary boycott as one of the worst evils and one of the most tyrannical devices imposed. . . . It restricts the public's freedom of choice, raises prices, interferes with the right to work and compels wholesale restrictions upon production."

Thus appear the two sides of the fence—dealing with the same problem, yet widely diverse in their interpretations of it. Regarding Taft-Hartley as a whole, labor has condemned it as unfair, one-sided, and designed as an instrument for "union-busting." Time and again it has professed the need for repeal of the act, and new legislation to be passed in its place. President Meany has called certain provisions of it "wholly indefensible," "grossly unfair," and "licensing union busting." Talbott, on the other hand, has indicated it is not inclusive enough

and strongly recommended that S. 76 be passed.

With all the shake-ups in union family matters this year, and more to be expected, Taft-Hartley may become even more of an issue than it has already. Business and labor will be increasingly called upon to set forth their views, and as vigorously as possible; for with the question of labor "reform" legislation hanging in the air for 1958, both sides will have a great deal to say on the necessity for change.

Union Officials Examine Evaluation

Meeting of 12 union officers to discuss job evaluation seems a promising sign.

A new promise of better understanding of managerial problems by labor men was indicated this summer when 12 senior officers of one union met to learn about the subject of job evaluation. Their seminar was conducted by a labor arbitrator and was opened by the personnel manager of one of the largest companies employing men from the union's own industry. The leaders looked fully into the principles and philosophies of evaluation.

Harrison M. Terrell, in discussing the seminar in the November *Personnel Journal*, said: "To my mind, this constructive and business-like action, designed to train union leaders to deal intelligently with a matter of importance, is more characteristic of the U. S. labor movement today than are the shenanigans which get so much publicity. It's too bad that fraud and corruption are so much more newsworthy than the honest efforts of able labor leaders."

Executive Health Programs Proposed

Surveys show that majority of companies studied have no health plans for their executives.

Of 447 companies surveyed throughout the country recently, 47 per cent do not have any type of executive health program. The Commerce and Industry Association of New York, Inc., conducting its own study in New York City following this survey, discovered that of 319 New York firms studied, only 41 per cent had programs.

Despite the fact that smaller companies use and need their executives most, these firms generally had no program or were not interested in forming any. This is surprising, in view of the fact that when illness strikes an executive in a small firm, there is seldom anyone available to fill in for him. His duties are broad, and tremendous loss can occur with neglect of the vital function which he commands.

The need for developing a good health service plan for executives is one which, by and large, has been overlooked. Health programs for workers have come to be expected, but little has been done to protect the men in the top positions of business. The Commerce and Industry Association reports that these men are at a premium and will continue to be for another decade, thus emphasizing the necessity for safeguarding the health and mental well-being of the nation's trained executives.

The association appointed an Executive Health Committee to study this lack and to make recommendations. The committee recognized three approaches to health plans: the in-company plan, where facilities are maintained on the company premises; the private physician; and hospitals and diagnostic services. The first, to be fully effective, would entail rather large expense and, despite such advantages as convenience and easy follow-up, has many drawbacks. The second plan is the simplest and many executives prefer it. However, of the 130 firms in the survey supplying medical examinations, only two permitted the executive full choice of his physician. The third plan appears to be the most popular. Here full facilities, adequate staff and complete privacy in records-keeping (highly important to the executive, who fears information "leaks" to fellow employees and to his superiors) are available.

The committee's recommendations for a proper examination include a complete history, electrocardiogram, X rays, blood tests and, after all laboratory work is completed, counseling by the physician—with specialists' services attainable if needed.

The cost of such a program would vary, but the Commerce and Industry Association indicated from its survey that for 1957, it would be approximately $150 per executive. This would include any required extras, spreading them to avoid attracting attention to the particular case. In the survey, it was pointed out that 94 per cent of the 130 companies carried the full expense of the examinations, one bore two thirds, one contributed nothing and three bore an average of $100.

Examinations must be voluntary, *never* compulsory, said the association; but with

adequate information and careful planning, 90 to 100 per cent participation can be expected.

We Need More Workers

An increasing demand for skilled workers is expected by 1965.

In the next ten years, America will need 10 million more workers than she needs now, but there will be fewer younger workers available for the jobs because of the low birth rate in the depression years of the 1930's. Only one-half million will be between the ages of 24 and 44; there will be 4½ million 45 years and older. These facts were brought out by Stuart Rothman, Solicitor of Labor, in an address in Minneapolis. He stressed the tremendous shortage that is expected in the near future of needed workers, and pointed out:

"For every 100 professional and technical workers we had in 1955, we will need 137 in 1965. For every 100 managers, officials and proprietors in 1955, we will need 123. For every 100 clerical and sales workers, we will need 127. For every 100 skilled craftsmen, we will need 124. For every 100 semi-skilled operatives, we will need 122."

Equally important, future workers must be skilled to meet advances in technology, and the nation is not producing them. Mr. Rothman cited federal and state projects and stated:

"The public works planners who disregard the human element in drawing up their plans may find, when they start construction, that they do not have the skilled workers to operate the machines and use the tools, or to provide for the consumer needs of the workers on the projects."

UAW Found Not Guilty of Violating Corrupt Practices Act

Union may put on political programs with wide coverage as long as it is educational to its members.

Where a union's officers used union dues to pay for certain political telecasts, a federal court jury sitting in Detroit found it not to be a violation of federal law. The union contended that the programs were part of their educational program even though they admittedly were in the political field. While the weekly television show was on for a year, the prosecution based its charge on nine programs. In the union's view the entire year of programs clearly showed their nature to be educational rather than political. As to the nine political telecasts, the union stated that they were aimed primarily at the members of the union as part of the union's educational program and were aimed only incidentally at the public. While the prosecution showed that all the political candidates interviewed on the show were Democrats, the union gave testimony to the effect that Republican candidates were invited to appear on the show but had refused to do so. Noteworthy is the fact that the constitutional question as to the validity of the law barring political contributions by a union was removed from this case by the verdict of the jury. The prosecution charged that expenditures of almost $6,000 for television interviews of political candidates such as Pat McNamara had in fact promoted their candidacies. However, the union's educational argument appeared to have swayed the jury.

Judge Picard, who presided over the case, had previously ruled, on a motion to dismiss brought by the union, that the indictments did not constitute a violation of the act as interpreted by the Supreme Court in *U. S. v. CIO.* (See *U. S. v. UAW*, 29 LABOR CASES ¶ 69,744.) However, the Supreme Court reversed Judge Picard, stating that the issue of whether the union was electioneering should be determined by the court. The Supreme Court refused to consider the constitutional argument until there was a factual determination in the lower court. (See 32 LABOR CASES ¶ 70,534.) With the jury finding no violation of the law, the constitutional argument will have to bide its time until another case presents itself.

More on College Debate

NAM offers fund of information and material open to collegians.

The National Association of Manufacturers has prepared a kit on the college debate subject for this year, "Resolved, that membership in a labor organization, as a condition of employment, should be illegal."

The NAM reports that its comprehensive kit, which includes a special monograph, is available without charge to college debaters. For further information, write to National Association of Manufacturers, 2 East 48th Street, New York 17, New York.

LABOR RELATIONS—Continued from page 840

it tends to cut off the employer from his vital markets and thus to threaten both the business involved and, derivatively, the employment of its employees. If the infliction of harm is thus equivalent, is the justification any greater?

"We submit here that the justification for organizational picketing in the light of current labor relations policy is even less than the justification for recognition picketing."

The article goes on to discuss the case where a union was specifically rejected by the employees in an election, and states that "the picketing conflicts with only the policy in favor of free employee choice; it does bear upon the national policy in favor of collective bargaining—unless that policy may accurately be narrowed into the policy of favoring collective bargaining between employers and *unions which represent an uncoerced majority of employees.* On the whole it would seem that such a narrowing of the policy in favor of collective bargaining is accurate even under the Wagner Act and certainly under the Taft-Hartley Act. While the Wagner Act did not in so many words prohibit employer bargaining with minority or stranger unions, it expressly emphasized the concept of free employee choice, . . . made it obligatory upon employers to bargain only with majority unions, . . . and went on to provide that only majority unions should have the status of exclusive bargaining representatives. . . . As for the Taft-Hartley Act, its declaration of the right of employees *not* to join unions would seem to amount to a clear indication that national policy was behind collective bargaining only where the employees themselves chose so to operate."

In conclusion the article stated: "The essential factor is the attempt by a union to secure *bargaining* status without *representative* status. The essential 'wrong' lies in the conflict between such an attempt and our dominant emphasis in labor relations policy on free employee choice. This factor, this wrong, is present in every case in which a minority or stranger union pickets for immediate recognition."

Racial Discrimination by Unions Attacked by High Court

Where Negro employees sought, under the Railway Labor Act, to compel their collective bargaining agent to represent them fairly, the United States Supreme Court ruled that the federal courts have a right to grant relief from racial discrimination by unions representing railroad employees.

The action in this case was a class suit brought by certain Negro members of the Brotherhood of Railway and Steamship Clerks, claiming that they were unlawfully discharged and replaced by white employees and that the union which represented them took no action and refused to give them normal protection because of the employees' race. Complaining that such discrimination constituted a violation of the employees' right, under the Railway Labor Act, to fair representation from their bargaining agent, the complaint concluded by asking for a declaratory judgment, injunction and damages.

The district court granted a motion to dismiss made by the union on the grounds that Congress had given the National Railroad Adjustment Board exclusive jurisdiction over the controversy. Relying on the same grounds, the Fifth Circuit affirmed the lower court's decision (30 LABOR CASES ¶ 69,887). The Supreme Court, in reversing these decisions, stated that since the decision in *Steele v. Louisville & Nashville Railroad Company*, 9 LABOR CASES ¶ 51,188, "this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination."

In speaking for the Court, Justice Black stated that the Railway Labor Act did not confer exclusive jurisdiction in the adjustment board since the act by its own terms states that the board's jurisdiction applies only to "disputes between an employee or group of employees and a carrier or carriers." According to the Court, this case does not involve a suit between employee and employer, but on the contrary is an action by employees against the bargaining agent to "enforce their statutory right not to be unfairly discriminated against by it in bargaining." Under the Railway Labor Act, the board has no power to protect the employees from such discrimination.

In the High Court's view, the railroad was not an indispensable party to the proceedings. The Court stated that since the railroad's rights or interests would not be affected by the proceedings, there was no need to compel joinder of that party.

The Court, in discussing the adequacy of the complaint in stating a basis for relief, said: "Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. The bargaining representative's duty not to draw 'irrelevant and invidious' . . . distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among others things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. . . . A contract may be fair and impartial on its face yet administered in such a way, with the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit."

As to the union's argument that under the Railway Labor Act aggrieved employees can file their own grievances with the board or, in the alternative, sue the employer, the Court stated that this "still furnishes no sanction for the Union's alleged discrimination in refusing to represent petitioners. The Railway Labor Act, in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf."

In discussing the union's contention that it was not bound to handle any grievance at all, the Court stated that "we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes." Thus the Supreme Court held the duty of unions under the Railway Labor Act to represent all employees without discrimination extended to the administration of union contracts, as well as to their execution.—*Conley v. Gibson*, 33 LABOR CASES ¶ 71,077.

Supreme Court Acts on Labor Relations

In the past month the United States Supreme Court has handed down decisions in the field of labor relations on such diverse subjects as strikes, jurisdictional disputes, racketeering and the non-Communist affidavit.

The Supreme Court left in effect a ruling that a railroad union can be enjoined from striking over a change in a railroad's operations by refusing to review the federal appellate court decision in *Railroad Trainmen v. New York Central Railroad* 32 LABOR CASES ¶ 70,771.

An Ohio Supreme Court ruling that a state trial court had the authority to enjoin picketing of an interstate employer by a union seeking recognition after it had been defeated in a Taft-Hartley election was reversed by the Supreme Court. While no opinion was written in this case, prior decisions were cited which held that the NLRB had exclusive jurisdiction over such matters. For the Ohio Supreme Court ruling, see *Machinists, District Lodge 34, Lodge 804 v. Cavett Company*, 33 LABOR CASES ¶ 71,072.

A federal appellate court decision in *U. S. v. Green*, 32 LABOR CASES ¶ 70,843, was denied review by the Court, thereby leaving in effect a ruling that a union and its business agent were justifiably convicted under the Hobbs Act for extortion in attempting to force an employer to hire unnecessary help.

The Court also refused to reconsider its refusal to review *Bryson v. U. S.*, 32 LABOR CASES ¶ 70,652, where a federal appellate court upheld the conviction of a union officer for filing a false non-Communist affidavit.

THE INDEX TO THIS VOLUME HAS BEEN REMOVED FROM THIS POSITION AND PLACED AT THE BEGINNING OF THE FILM FOR THE CONVENIENCE OF READERS

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Faces Up to '58 . . .

WITH THIS ISSUE we close the cover on Volume 8. It's a good volume. It's been filled with good, authoritative, analytical articles on many important issues in the labor-management relations field. It is appropriate that at this time we express our appreciation as publishers to over 100 persons who contributed articles. For the most part, they are rewarded by the sense of accomplishment that comes from contributing a part of one's self to one's own profession. We are happy that we could provide the vehicle by which their thoughts and opinions were made a part of the living record. So much for 1957; now for 1958.

MANY OF THE EVENTS of last year have laid the groundwork for legislative changes to come in 1958. In terms of articles, this means that more than other kinds of changes, proposed and enacted legislation will be discussed by those who write in this field. There will be no dearth of subjects. For instance, the Administration hopes for an early enactment for what it calls two "basic" bills. One would require the registration, detailed reporting and public disclosure of the financial operation of employee pension and welfare funds. The other would permit the Secretary of Labor to make public the union financial reports, which are now made to the Labor Department.

Legislation may be expected also in the area that has to do with union elections, providing for secrecy and periodicity in the election of union officers. Also, while recognizing the right of legitimate picketing by unions, Congress is of the mind to place certain restrictions on it.

THERE IS belated recognition of the public's interest in the relationship of unions and employers and their negotiations which affect the relationship of cost and price. There is belated recognition of the public's natural repugnance to corrupt influences in institutions operating within our economy. Public opinion is a great prompter, and Congress will take up on cue.

The year 1958, then, holds promise of being a year of enlightenment in labor-management relations to the great benefit of labor, business and the public.

"In the sweat of thy face shall thou eat bread" imposes a duty and an obligation and gives a right; each is to be implemented rather than impinged by democratic institutions.

"In the sweat of thy face
shalt thou eat bread."

"And on the seventh day God ended
His work which He had made;
and He rested on the seventh day
from His work which He had done."

"Every man's work
shall be made manifest."

"Thou renderest to every man
according to his work."

"The laborer is worthy of his hire."